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REPORTS

OF

CASES IN BANKRUPTCY,

ARGUED AND DETERMINED

IN

THE COURT OF REVIEW,

AND ON

APPEAL BEFORE THE LORD CHANCELLOR.

By EDWARD E. DEACON and EDWARD CHITTY, Esqrs.
BARRISTERS AT LAW.

VOL. I.

HILARY, EASTER AND TRINITY TERMS,
2 WILLIAM IV., 1832.

LONDON:
SAUNDERS AND BENNING, LAW BOOKSELLERS,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
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1833.

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PREFACE.

In submitting the First Volume of these Reports to the judgment of the Profession, the Authors feel it incumbent on them to state, that they had made arrangements with their Publishers for reporting the Cases determined by the New Court, prior to the announcement by Mr. Montagu and Mr. Bligh of their intention of entering on a similar undertaking. This apology they owe to the Profession, for burthening it with cotemporary Reports in Bankruptcy.

Some few cases may be found in the early part of this Volume apparently of minor importance; yet it is deemed advisable to introduce them, as exhibiting the practice of this Court in the infancy of its jurisdiction.

The Authors have also thought it would not be unacceptable to the Practitioners, to give, in the Appendix to this Volume, a Collection of the various Forms of Proceedings, which have been adapted to the different provisions of the new Statute, and have been sanctioned for general use by the Court of Review, together with the General Orders and Statutes relating to Bankruptcy.

In conclusion, the Authors beg to acknowledge the valuable assistance they have derived from the kindness of the Judges, and to return their thanks, not less to the Bar in general, than to their Learned and Honourable Competitors, for their liberality in facilitating this publication.

December, 1832.

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I & II WILLIAM IV. c. 56.

AN ACT TO ESTABLISH A COURT IN BANKRUPTCY.

20th October, 1831.

WHEREAS an Act was passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled, *An Act to amend the Laws relating to Bankrupts:* And whereas it is expedient to provide means of administering and distributing the estate and effects of bankrupts, and of determining the questions which from time to time arise touching the same, other than are provided by the said act; to the end that the rights, as well of the bankrupts themselves as of their creditors, may be enforced with little expense, delay, and uncertainty as possible, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That it shall and may be lawful for his Majesty, his heirs and successors, by charter or letters-patent under the great seal of the United Kingdom of Great Britain and Ireland, to erect and establish a Court of judicature, which shall be called "The Court of Bankruptcy," and by a commission under the great seal to appoint one person, being a serjeant or a barrister at law of not less than ten years standing, to be the chief judge of the said Court, and three persons, being serjeants or barristers at law of not less than ten years standing at the bar, or of five years standing at the bar, having previously practised five years as a special pleader below the bar, to be other judges of the said Court, and six persons, being barristers at law of not less than seven years standing at the bar, or of four years standing at the bar, having previously practised as a special pleader for three years below the bar, to be called commissioners of the said Court, and from time to time to supply any vacancy in the number of the said judges and commissioners; and the same Court shall be and constitute a Court of Law and

6 G. 4, c. 16.

Establishment of a Court of Bankruptcy.

Equity, and shall, together with every judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a Court of Record, or judge of a Court of Record, and all other rights, incidents, and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's courts of law or judges at Westminster.

The Court of Review.

II. And be it enacted, That the said judges or any three of them shall and may form a Court of Review, which shall always sit in public, save and except as may be otherwise directed by this act, or by the rules and regulations to be made in pursuance hereof, and shall have superintendence and controul in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy as now usually are or lawfully may be brought, by petition or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is herein otherwise provided, and also to investigate, examine, hear, and determine all such other matters within the jurisdiction of the said Court of Bankruptcy, as are by this act, or may be by the said rules and regulations, assigned and referred to the said Court of Review.

Mode of application to Court of Review.

III. And be it enacted, That all such matters to be heard and determined in the said Court of Review shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as hereinafter provided, subject to an appeal to the Lord Chancellor on matters of law and equity, or on the refusal or admission of evidence only; and in all cases of appeal to the Lord Chancellor by virtue of this act such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct; which special case shall be approved and certified by one of the judges of the said Court of Review in matters arising in the said Court, and by the judge trying the issue in matters arising out of the trial of issues; and the determination of such judge on the settlement of such case shall be final and conclusive: provided always, that all appeals to the Lord Chancellor by virtue of this act shall be heard by the Lord Chancellor only, and not by any other judge of the High Court of Chancery.

Mode of appeal to the Lord Chancellor.

Court of Review may direct issues.

IV. And be it enacted, That it shall be lawful for the said Court of Review to direct any issue of fact arising therein to be tried by a jury before one of the judges thereof, or before a judge of assize, and to issue process to compel the attendance of jurors and witnesses, and to

enforce the orders and decrees of the said Court of Review, and to that end to exercise all the powers vested for such purposes in any of his Majesty's Courts of Record at Westminster.

Costs in the Court of Review.

V. And be it enacted, That all costs of suit between party and party in the said Court of Review shall be in the discretion of the Court, and shall be taxed by one of the masters of the High Court of Chancery.

Subdivision Courts.

VI. And be it enacted, That the said six commissioners may be formed into two Subdivision Courts, consisting of three commissioners for each Court, for hearing and determining the matters and things and making the examinations hereinafter referred thereto; and all references or adjournments by a single commissioner to a Subdivision Court, by virtue of this act, shall be to the Subdivision Court to which he belongs, unless the said commissioner, in case of the sickness of some one or more of the commissioners of such Subdivision Court, or other sufficient cause, shall think fit otherwise to direct; and the said Subdivision Courts may sit either in public or private, as they shall see fit, unless where it shall be otherwise provided by this act, or by the rules to be made as hereinafter mentioned.

The powers of commissioners.

VII. And be it enacted, That in every bankruptcy prosecuted in the said Court of Bankruptcy it shall and may be lawful for any one or more of the said six commissioners to have, perform, and execute all the powers, duties, and authorities by any act or acts of Parliament now in force vested in commissioners of bankrupt, in all respects as if they or any one or more of them were in every instance specially authorized and appointed for the purpose by a separate commission under the great seal of the United Kingdom of Great Britain and Ireland; provided always, that no single commissioner shall have power to commit any bankrupt or other person examined before him otherwise than to the care and custody of a messenger or other officer of the said Court, to be by him detained in his custody, and brought up before a Subdivision Court, or the Court of Review, within three days after such commitment, for which purpose one of such Courts shall be forthwith assembled, and to which Court such examination shall be adjourned.

Oath of judges and commissioners.

VIII. And be it enacted, That in lieu of the oath directed to be taken by commissioners under the said recited act, every judge and commissioner to be appointed by virtue of this act shall, before he shall be capable of acting in the execution of any of the powers and authorities given by this act, take an oath in the presence of the Lord Chancellor to the effect following; (that is to say,)

'I, *A. B.* do swear, That I will faithfully, impartially, and honestly, 'according to the best of my skill and knowledge, execute the several 'powers and trusts reposed in me [as the chief judge, *or* one of the 'judges, *or* one of the commissioners, *as the case may be,* of the Court 'of Bankruptcy,] and that without favour or affection, prejudice or 'malice. So help me God.'

And any judge or commissioner having once taken the said oath shall not again be required to take the same so long as he shall continue in office.

Appointment of registrars and deputy registrars.

IX. And be it enacted, That it shall be lawful for his Majesty, his heirs and successors, under his or their royal sign manual, from time to time to appoint two registrars, and any number not exceeding eight deputy registrars, to act as such in the said Court of Bankruptcy, and to attend upon and assist the said judges and commissioners; which officers so to be from time to time appointed shall hold their respective offices during good behaviour, notwithstanding the demise of his Majesty, or any of his heirs or successors; provided always, that it shall be lawful for his Majesty, his heirs and successors, to remove any of such officers upon a certificate from the said Court of Review, or one of the Subdivision Courts, of some sufficient reason, to be named therein, for such removal.

All attornies and solicitors may practise in this Court.

X. And be it enacted, That all attornies and solicitors of any of the superior Courts of law or equity at Westminster may be admitted and have their names enrolled in the said Court of Bankruptcy, without any fee or charge other than such as shall be allowed by this act, or any rule or regulation to be made in pursuance thereof, and may appear and plead in any proceedings in the said Court without being required to employ counsel, (except in proceedings before the said Court of Review, and upon the trial of issues by jury); and in case any person, not being an attorney or solicitor duly admitted as aforesaid, shall practise in the said Court of Bankruptcy as an attorney or solicitor, he shall be deemed guilty of a contempt of the said Court, and be liable to all the penalties incident thereto, on complaint thereof made to the Court of Review; and that all the laws and statutes now in force concerning attornies and solicitors shall extend to attornies and solicitors practising in the the said Court of Bankruptcy.

Judges to make rules for regulating the proceedings of the Court.

XI. And be it enacted, That the judges of the said Court of Review, with the consent of the Lord Chancellor, shall have power from time to time to make general rules and orders for regulating the practice of the said Court of Bankruptcy, the sittings of the judges and com-

missioners thereof, and the conduct of the other officers and of the practitioners therein.

The Lord Chancellor to issue a fiat in lieu of a commission.

XII. And be it enacted, That in every case wherein the Lord Chancellor, by virtue of any former act, hath power to issue a commission of bankrupt under the great seal, it shall and may be lawful for him, and also for the Master of the Rolls, the Vice-Chancellor, and each of the Masters of the Court of Chancery acting under any appointment by the Lord Chancellor to be given for that purpose, on petition made to the Lord Chancellor against any trader having committed any act of bankruptcy by any creditor of such trader, and upon his filing such affidavit and giving such bond as is by law required, to issue his fiat under his hand in lieu of such commission, thereby authorizing such creditor to prosecute his said complaint in the said Court of Bankruptcy, or to prosecute the same elsewhere before such discreet and proper persons as the Lord Chancellor, or as the Master of the Rolls, Vice-Chancellor, or one of the Masters of the Court of Chancery, acting as aforesaid, by such fiat may think fit to nominate and appoint; and that the persons so appointed shall thereby have the like power and authority, to all intents and purposes, as if they were assigned and appointed special commissioners by virtue of a commission under the great seal.

Fiats to be filed in Court of Bankruptcy.

XIII. And be it enacted, That every such fiat, prosecuted in the said Court of Bankruptcy, shall be filed and entered of record in the said Court, and shall thenceforth be a record of the said Court, and it shall thereupon be lawful for any one or more of the commissioners thereof to proceed thereon in all respects as commissioners acting in the execution of a commission of bankrupt, save and except as such proceeding may be altered by virtue of this act.

Appointment of country commissioners, and fiats to them.

XIV. And be it enacted, That the judges who go the several circuits in England and Wales may be directed by the Lord Chancellor from time to time to return to him the names of such number as he shall think fit to require of barristers, solicitors, and attornies, practising in the counties to the said circuit belonging, and upon such persons being returned, and approved by the Lord Chancellor, the fiat or fiats aforesaid not directed to the Court of Bankruptcy shall be directed to some one or more of such persons in rotation to act as commissioners of bankrupt, according to the districts or places for which such persons shall be so returned, and to no other person than such as shall be included in such return: provided always, that it shall be lawful for

the Lord Chancellor at any time to remove any person from the lists to be so returned, for such cause as to him shall seem fit.

Oath of commissioners in the country.

XV. And be it enacted, That in lieu of the oath required by the said recited act to be taken by commissioners of bankrupt, all persons acting as such commissioners elsewhere than in the said Court of Bankruptcy shall take an oath to the effect following:—

'I, *A. B.* do swear, That I will faithfully, impartially, and honestly, 'according to the best of my skill and knowledge, execute the several 'powers and trusts reposed in me as a commissioner in a prosecution 'of bankruptcy against and that without favour 'or affection, prejudice or malice.

'So help me God'.

Provisions of former acts made applicable to this act and to fiats.

XVI. And be it enacted, That all the laws and statutes, rules and orders, now in force relating to bankrupts, or to commissioners of bankrupt, or to proceedings under such commissions, or to the subject matters of such proceedings, or to the persons concerned therein or in any way affected thereby, shall in like manner extend and be construed to extend in every respect, as far as the same may be applicable, to this act, and to fiats issued in pursuance thereof, and to all proceedings under the same, and to all the subject-matters of such proceedings, and to all persons concerned therein or in any way affected thereby, to all intents and purposes whatsoever, as if every such fiat were a commission of bankrupt under the great seal of the United Kingdom of Great Britain and Ireland, save and except as may be otherwise directed by this act.

Manner of proceeding, in case the bankrupt shall dispute the adjudication.

XVII. And be it enacted, That if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the said Court of Review, such petition to be presented within two calendar months from the date of such adjudication, if such trader shall be then residing within the United Kingdom, or within three calendar months from the date aforesaid if then residing in any other part of Europe, or within one year from the date aforesaid, if then residing elsewhere, or within such other time as the said Court shall allow, (not exceeding one year, to be computed from the date aforesaid,) such Court of Review shall proceed to hear and decide on the said petition; or, at the option of the said bankrupt, and on his finding such security for costs (if the said Court shall think fit to require any security) as by the said Court shall be approved, shall direct an issue to try any matter of fact

affecting the validity of such adjudication by a jury, to be duly impannelled and sworn for that purpose, before the chief judge or any one or more of the other judges of the Court of Bankruptcy; and if the verdict on such issue shall not be set aside, on application made to the said Court of Review, within one month after the said trial, or if the adjudication of the commissioner shall not be set aside by the said Court of Review on the petition aforesaid, such verdict or such adjudication of the said commissioner shall in all cases, as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication, any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: providing always, that an appeal shall be to the Lord Chancellor from the decision of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only.

Fiat to issue on petition to Lord Chancellor.

XVIII. Provided always, and be it further enacted, That after any such issue shall have been tried as aforesaid, it shall and may be lawful for the Lord Chancellor, on petition to him, to be presented within one calendar month after such verdict, and upon notice thereof to the bankrupt, upon special circumstances, to be submitted to the said Lord Chancellor, to order that another fiat do issue at the instance of any other than the former petitioning creditor against the said bankrupt, and that such fiat shall and may be supported by any debt, trading, or act of bankruptcy, other than those given in evidence on the trial of such issue.

Power to annul fiat.

XIX. And be it enacted, That it shall be lawful for the Lord Chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled, and such order shall have all the force and effect of a writ of supersedeas of a commission, according to the existing laws and practice in bankruptcy.

Meetings of creditors.

XX. And be it enacted, That it shall be lawful for any commissioner who shall make any adjudication of bankruptcy to appoint two or more public meetings, instead of the three meetings directed by the said recited act, for the bankrupt to surrender and conform, the last of which said meetings shall be on the forty-second day after the

publication of his bankruptcy in the *Gazette;* and the choice of assignees shall take place at the first of such two meetings.

Powers given to the commissioners may be exercised by the judges.

XXI. And be it enacted, That in all cases in which power is by this act given to any one of the said commissioners to act, such power shall and may in like manner be exercised by the said chief judge, or by any one of the said other judges, as occasion may require; and where any such judge so acting would, in case he were a commissioner, make any reference or adjournment to a Subdivision Court, such reference or adjournment shall be made by such judge to the Court of Review instead of to a Subdivision Court.

Appointment of official assignees.

XXII. And be it enacted, That a number of persons, not exceeding thirty, being merchants, brokers, or accountants, or persons who are or have been engaged in trade in the cities of London or Westminster or the parts adjacent, shall be chosen by the Lord Chancellor to act as official assignees in all bankruptcies prosecuted in the said

Their duty.

Court of Bankruptcy; one of which said official assignees shall in all cases be an assignee of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors; such official assignee to give such security, to be subject to such rules, to be selected for such estate, and to act in such manner, as the said chief and other judges, with the consent of the Lord Chancellor, shall from time to time direct; and all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of all the estate and effects, real and personal, of the bankrupt, shall in every case be possessed and received by such official assignee alone, save where it shall be otherwise directed by the said Court of Bankruptcy or any judge or commissioner thereof; and all stock in the public funds or of any public company, and all monies, exchequer bills, India bonds, or other public securities, and all bills, notes, and other negotiable instruments, shall be forthwith transferred, delivered and paid by such official assignee into the Bank of England, to the credit of the Accountant General of the High Court of Chancery, to be subject to such order, rule, and regulation, for the keeping of the account of the said monies and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as the Lord Chancellor, or the said Court of Review, or any judge of the said Court of Bankruptcy, if authorised so to do by any general order of the same Court, shall direct; and if any such assignee shall neglect to make such transfer, delivery, or payment, every such assignee shall be

liable to be charged in the same manner, as by the said recited act is provided in cases of neglect by assignees to invest money in the purchase of exchequer bills, when directed so to do: provided always, that until assignees shall be chosen by the creditors of each bankrupt, such official assignee so to be appointed to act with the assignees to be chosen by the creditors shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estates and effects.

Proviso restricting the authority of official assignees.

XXIII. Provided always, and be it enacted, That nothing herein contained shall extend to authorize any such official assignee to interfere with the assignees chosen by the creditors in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estates or effects.

For filling up vacancies in the number of assignees.

XXIV. And be it enacted, That it shall be lawful for the Lord Chancellor, from time to time, as any vacancy may occur in the said before-mentioned number of official assignees, to appoint some other such person as aforesaid to fill any vacancy so occurring; and in case of the death or removal of any official assignee who shall have been appointed to act in any bankruptcy, it shall be lawful for the said Court of Bankruptcy, subject to any rules to be made by virtue of this act, to appoint another official assignee of the number hereby prescribed to act in the same bankruptcy, in the place of the assignee who shall have so become dead or been removed.

Personal estate how to vest in assignees.

XXV. And be it enacted, That when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them; and as often as any such assignee shall die, or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall by virtue of such appointment vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose.

Real estate how to vest.

XXVI. And be it enacted, That where any person shall have been adjudged a bankrupt, all such present and future real estate of such bankrupt, whether in the United Kingdom of Great Britain and

Ireland, or in any of the dominions, plantations, or colonies belonging to his Majesty, as by the said recited act is directed to be conveyed by the commissioners to the assignees, shall vest in such bankrupt's assignee or assignees for the time being, by virtue of his or their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall by virtue of such appointment vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose.

In cases where a conveyance of the property of a bankrupt would require to be registered, the certificate of appointment of the assignee shall be registered.

XXVII. Provided always, and be it enacted, That where according to any laws now in force any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, enrolled, or recorded in any registry office in England, Wales, or Ireland, or in any registry office, court, or other place in Scotland, or any of the dominions, plantations, or colonies belonging to his Majesty, then, in every such case, such certificate as hereafter is described of the appointment of an assignee or assignees shall be registered in the registry office, court, or place wherein such conveyance or assignment as last aforesaid would require to be registered, enrolled or recorded; and the registry hereby directed shall have the like effect to all intents and purposes as the registry, enrolment, or recording of such conveyance or assignment as last aforesaid, would have had; and the title of any purchaser of any such property as last aforesaid, for valuable consideration, without notice of the bankruptcy, who shall have duly registered, enrolled, or recorded his purchase deed previous to the registry hereby directed, shall not be invalidated by reason of such appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within the times following; (that is to say,) as regards the United Kingdom of Great Britain and Ireland, within two months from the date of such appointment; and as regards all other places, within twelve months from the date thereof.

Seal of the court.

XXVIII. And be it enacted, That the said judges of the said Court of Bankruptcy shall cause to be made a seal of the said court, in such form as they shall think fit, and shall cause to be sealed therewith all such proceedings, documents, and copies as by the law now

in being, or by this act, or by any rule or order of the said court, shall be required to be so sealed.

XXIX. And be it enacted, That a certificate of the appointment of such assignees, purporting to be under the seal of the said Court of Bankruptcy, shall be received as evidence of such appointment, in all courts and places whatsoever, without further proof. Evidence of appointment of assignees.

XXX. And be it enacted, That any one of the said six commissioners, if he think fit, may adjourn the examination of any bankrupt or other person to be taken either before a Subdivision Court or the Court of Review, and may likewise adjourn the examination of a proof of debt to be heard before a Subdivision Court; which said court shall proceed with such last-mentioned examination, and finally, and without any appeal, except upon matter of law or equity, or of the refusal or the admission of evidence, shall determine upon such proof of debts: provided always, that in case, before the said commissioner or Subdivision Court, both parties, the assignees or the major part of them, and the creditor, consent to have the validity of any debt in dispute tried by a jury, an issue shall be prepared under the direction of the said commissioner or Subdivision Court, and sent for trial before the chief judge or one or more of the other judges; and if one party only applies for such issue, the said commissioner or Subdivision Court shall decide whether or not such trial shall be had, subject to an appeal as to such decision to the Court of Review. Adjournment of examinations to Subdivision Courts. Trial of disputed debts.

XXXI. And be it enacted, That if such commissioner or Subdivision Court shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in the case of any disputed debt, such matter may be brought under review of the Court of Review by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal shall be disposed of, and a sum not exceeding any expected dividend or dividends on the debt in dispute in such proof may be set apart in the hands of the said Accountant General until such decision be made; and in like manner there may be an appeal on the like matter of law or equity from the Court of Review to the Lord Chancellor. Certain decisions of commissioners may be brought under review or appealed against.

XXXII. And be it enacted, That if the Court of Review shall determine in any appeal touching any decision in matter of law upon the whole merits of any proof of debt, then the order of the said Court shall finally determine the question as to the said proof, unless an appeal to the Lord Chancellor be lodged within one month from such determination; and in case of such an appeal, the determi- Determination of Court of Review in favour of appeals touching such decisions to be final, unless appealed against within one month.

nation of the Lord Chancellor thereupon shall in like manner be final touching such proof; but if the appeal, either to the Court of Review or the Lord Chancellor, shall be allowed in relation to the admission or refusal of evidence, then and in that case the proof of the debt shall be again heard by the commissioner or Subdivision Court, and the said evidence shall be then admitted or rejected accordingly.

New trial of issues.

XXXIII. And be it enacted, That after any issue by this act authorized shall be tried, a new trial may be moved in the Court of Review, which new trial shall be granted or refused according to the rules of the common law and the practice of the Courts of Westminster in granting or refusing new trials.

Proof of debts by affidavit.

XXXIV. And be it enacted, That it shall be lawful for any creditor to make proof of his debt by affidavit, sworn before one of the said judges or commissioners, or before a master in Chancery, ordinary or extraordinary, or, if such creditor shall live out of England, by affidavit sworn before a magistrate where such creditor shall be residing, and attested by a notary public, British minister or consul: subject nevertheless to such rules and orders touching the personal attendance of any creditor to make such proof according to the existing laws and practice in bankruptcy, as the said Court of Review, with the consent of the Lord Chancellor, shall from time to time make and direct.

Assignees may appoint the bankrupt to superintend the management of the estate.

XXXV. And be it enacted, That in every case the assignees may, with the approbation of the proper Subdivision Court, appoint the bankrupt himself to superintend the management of the estate, or to carry on the trade for behoof of the creditors, and in all or any other respects they may think fit to aid them in administering the bankrupt's estate and effects, in such manner and on such terms as they may think best for the benefit of the persons interested in the estate.

Removal of assignees.

XXXVI. And be it enacted, That the Court of Review shall have power to remove any assignee of any estate; and the order of such court thereupon shall be final and conclusive to all intents and purposes, and not subject to any review by the Lord Chancellor or otherwise.

Appeal to the House of Lords.

XXXVII. And be it enacted, That in case the Lord Chancellor shall deem any matter of law or equity brought before him by way of appeal from the Court of Review to be of sufficient difficulty or importance to require the decision of the House of Lords, or in case both parties in any proceeding before the Court of Review shall desire that any such matter may be determined in the first instance by the House of Lords, and not by the Lord Chancellor, then and in such case the Lord Chancellor or the Court of Review may direct the

whole facts whereupon such question of law or equity shall arise, to be stated in the form of a petition of appeal to the House of Lords, and the party appealing may carry such appeal to the House of Lords in like manner as other appeals are preferred to that House; provided always, that the cases to be lodged by the parties in the House of Lords shall be confined in matter of fact, in cases of appeal from the Lord Chancellor, to setting forth the special case brought up to the Lord Chancellor from the Court of Review, and in cases of appeal from the said Court of Review, to setting forth a special case, to be approved and certified in manner herein-before provided touching appeals to the Lord Chancellor, and to such arguments on the point of law as the parties may be advised to state.

The Court may take evidence vivâ voce, or upon affidavit before a judge or a master.

XXXVIII. And be it enacted, That the said judges and commissioners of the said Court of Bankruptcy shall in all matters within their respective jurisdictions have power to take the whole or any part of the evidence either *vivâ voce* on oath, or upon affidavits to be sworn before one of the said judges or commissioners, or a master, ordinary or extraordinary, in Chancery, as the said Court may in any case direct, or as the Lord Chancellor may from time to time prescribe, by any general rule to be made by virtue of this act.

Commissions depending in London to be removed into the Court of Bankruptcy.

XXXIX. And be it enacted, That all power, jurisdiction and authority of the commissioners named in any commission of bankrupt depending in the Court of Commissioners of Bankrupts in the city of London, shall cease and determine, and that every such commission shall thereupon be removed into the said Court of Bankruptcy, and that all further proceeding thereon shall be thenceforth prosecuted and carried on in like manner as if they had been originally commenced therein by virtue of a fiat under the hand of the Lord Chancellor issued pursuant to this act, save as may be otherwise directed by this act.

Power to appoint official assignees to act with the existing assignees under such commissions, and to whom the latter shall deliver over effects.

XL. And be it enacted, That it shall be lawful for each commissioner of the said court who shall thenceforth act in such commission, at his discretion, to appoint some one of the aforesaid official assignees to act with the existing assignees, if any, under such commission, and to direct the existing assignees to pay and deliver over to such official assignees all monies, books, papers, and effects whatsoever in their possession or custody as such assignees: and all the real and personal estate of the bankrupt under such commission shall immediately on such appointment vest in such official assignee jointly with the existing assignees, if any, in like manner as if the proceedings

in the said bankruptcy had originally been commenced by virtue of this act, without prejudice to any action or suit commenced, or any contract entered into, by the existing assignees at the time of the passing of this act.

Construction and extent of this act.

XLI. And be it enacted, That wherever this statute hath used words importing the singular number, or the masculine gender only, yet it shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and that wherever the words Lord Chancellor are used, they shall also be understood to mean Lord Keeper and Lords Commissioners for the custody of the great seal; and that this act shall not extend either to Scotland or Ireland, except where the same are expressly mentioned or referred to.

Concerted bankruptcies.

XLII. And be it enacted, That from and after the passing of this act no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them, save and except where any petition to supersede a commission for any such cause shall have been already presented and shall be now pending.

Arbitration.

XLIII. And be it enacted, That if the assignees of any bankrupt's estate shall agree to refer any matter in dispute with any party to arbitration, in such manner as by law they are empowered to do, such agreement of reference may be made a rule of the Court of Bankruptcy by this act constituted, and thereupon all such rights and remedies, duties and liabilities, shall accrue from such reference so made a rule of the said court, in respect of arbitration and award, and non-performance of such award, and otherwise howsoever, as by law at present accrue upon any submission of reference made a rule of any of his Majesty's other courts of record.

Abolition of fees to patentee.

XLIV. And be it enacted, That all fees heretofore payable to the person holding the patentee's office "for the execution of the laws and statutes concerning bankrupts," shall cease and determine; and that no fee whatever shall be payable to any person whomsoever holding any office under or by virtue of this act, except such as are provided by this act, or in the schedules hereto annexed, and except the fees payable to any commissioner acting in the execution of any commis-

sion or fiat issued or to be issued, and to be executed elsewhere than in the Court of Bankruptcy.

10*l.* to be paid to the secretary of bankrupts on the granting of every fiat; and application thereof.

XLV. And be it enacted, That there shall be paid to the Lord Chancellor's secretary of bankrupts, upon the granting of every fiat, in lieu of a commission of bankrupt, by virtue of this act, the sum of ten pounds; and the sums to be so received by the said secretary shall be by him paid once a week, or oftener, as the Lord Chancellor shall think fit to direct, into the Bank of England, to the credit of the accountant general of the High Court of Chancery, to a separate account, to be intituled "The Secretary of Bankrupts' Account;" and all monies to be paid into the said account shall be subject to such general orders touching the payment in, investment, accounting for, and payment out of such monies for the purposes hereinafter provided, as the Lord Chancellor shall from time to time think fit to prescribe.

Assignee of bankrupt's estate to pay 20*l.* to the like account.

XLVI. And be it enacted, That there shall be paid to the said accountant general, to be placed by him to the like account, by the official assignee of each bankrupt's estate to be administered in the said Court of Bankruptcy, out of the first monies that shall come into his hands, and immediately after the choice of assignees by the commissioners, the sum of twenty pounds.

Sums to be paid on all commissions moved into the Court of Bankruptcy.

XLVII. And be it enacted, That in all cases of commissions of bankrupt, which by virtue of the provisions herein contained shall be removed into the said Court of Bankruptcy, and under which the choice of assignees shall have taken place prior to the commencement of this act, there shall be paid by the assignees of every such bankrupt's estate, in lieu of all other sums directed to be paid under and by virtue of this act, the sum of three pounds on every sitting under such bankruptcy which shall be held in the said Court, or by any division judge or commissioner thereof: such sum to be paid to the said accountant general, and to be carried to the said account intituled "The Secretary of Bankrupts' Account:" provided always, that no fee whatever shall be paid on any meeting for the purpose of auditing the assignees' accounts, unless there shall appear to the commissioners to be sufficient assets of the bankrupt's estate for the payment thereof.

Restriction of fees on auditing assignees' accounts.

Power for the secretary of bankrupts to receive the fees in the first schedule.

XLVIII. And be it enacted, That it shall be lawful for the Lord Chancellor's secretary of bankrupts for the time being, and his clerks, and he and they are hereby respectively authorized and required, to receive and take the several fees and sums set forth in the first schedule hereto annexed, in respect of the business therein specified; and

the amount to be so received shall be by the said secretary applied in payment of salaries to a messenger and housekeeper, and the various other expenses of his office, and the surplus (if any) of such monies shall and may be retained for his own use.

Power for the chief registrar to receive the fees in the second schedule.

XLIX. And be it enacted, That it shall be lawful for the chief registrar of the said Court of Bankruptcy for the time being, and his clerks, and he and they are hereby respectively authorized and required, to receive and take the several fees or sums set forth in the second schedule hereto annexed, in respect of the business therein specified; and the amount to be so received shall be by him applied in payment of such salaries or sums of money to clerks, ushers, and other under officers of the said Court of Bankruptcy, as the Lord Chancellor may from time to time order and direct; and the yearly surplus (if any) of such monies shall be divided between the two registrars, or between them and the deputy registrars of the said Court, in such proportions as the Lord Chancellor shall appoint.

Salaries of judges and other officers of the Court.

L. And be it enacted, That from and after the commencement of this act there shall be paid and payable, out of the monies and securities standing to the said account to be intituled "The Secretary of Bankrupts' Account," the yearly sums following, as and for salaries to the judges and other officers for the time being herein-after named; *videlicet*, to the chief judge of the said Court of Bankruptcy the sum of three thousand pounds, to each of the other judges of the said Court the sum of two thousand pounds, to each of the Commissioners of the said Court the sum of one thousand five hundred pounds, to the Lord Chancellor's secretary of bankrupts the sum of one thousand two hundred pounds, to each of the registrars of the said Court the sum of eight hundred pounds, to each of the deputy registrars of the said Court the sum of six hundred pounds, to the first clerk of the said secretary of bankrupts the sum of five hundred pounds, and to the second clerk of such secretary the sum of three hundred pounds; which said several sums shall be paid from time to time quarterly, free and clear from all taxes and deductions whatsoever, on the eleventh day of April, the eleventh day of July, the eleventh day of October, and the eleventh day of January in every year, by equal portions, the first payment thereof respectively to be made on the eleventh day of April next; and that if any person for the time being holding either of the said offices shall die, resign, or be removed from the same, the executor or administrator of the person so dying, or the person so resigning or being removed, shall be entitled to receive

such proportionable part of his salary as shall have accrued during the time that such person shall have executed his office since the last payment; and that the successor of any such person so dying, resigning, or being removed as aforesaid, shall be entitled to receive such portion of his salary as shall be accruing or shall accrue from the day of such death, resignation or removal.

Restriction as to judges and other officers practising as barristers, or being attornies.

LI. And be it enacted, That no judge, commissioner, registrar or deputy registrar, to be appointed by virtue of this act, shall during their respective continuance in such offices practise as a barrister, and that no attorney or solicitor, whose name shall be on the rolls of the said Court of Bankruptcy, or of any of his Majesty's Courts of Westminster, as such attorney or solicitor, shall be appointed to or hold any of the said offices.

Provision for compensation to the patentee of bankrupts.

LII. And whereas the office of the patentee "for the execution of the laws and statutes concerning bankrupts" is now held by the Reverend Thomas Thurlow, by virtue of a grant thereof by letters-patent made to him for the term of his natural life, and the same office hath also been granted by letters-patent to the Honourable William Henry John Scott for the term of his natural life, after the termination of the previous existing interest therein: And whereas the duties of the said office, and the fees and emoluments payable in respect thereof, will by virtue of the provisions of this act be wholly discontinued; and it is just and reasonable that such compensation as is hereinafter provided should be made to the said patentees, in lieu of such fees and emoluments; be it therefore enacted, That the accountant general and the two senior masters of the High Court of Chancery shall be and they are hereby appointed commissioners for the purpose after-mentioned, and the said commissioners shall, within six months after the passing of this act, by examination on oath or otherwise, which oath they and each of them are and is hereby authorized to administer, inquire into and ascertain the amount of the annual clear legal profits and emoluments of the said office, to be computed on an average of the last three years, (after deducting all payments accustomed to be made thereanent,) and shall certify such amount in writing under their hands to the Lord High Chancellor, whereupon an annuity equal to such amount shall forthwith become a charge on an account to be opened by the said accountant general, and to be intituled "The Secretary of Bankrupts' Compensation Account," and shall be paid and payable to the said Thomas Thurlow during his natural life, and from and after his decease to the said

William Henry Scott during his natural life, in case he shall survive the said Thomas Thurlow; which annuity shall commence and be computed from the eleventh day of January next, and be payable half-yearly by equal portions on the eleventh day of July and the eleventh day of January in every year, the first of such payments to be made on the eleventh day of July next: provided always, that in case of the death of either of the said patentees in the interval between either of the said half-yearly days of payment, his executor or administrator shall be entitled to receive a proportionate part of the annuity then payable to the day of his decease; and that the said William Henry John Scott, in case he shall survive the said Thomas Thurlow, shall be entitled to receive on the next half-yearly day of payment after his decease a proportionate part only of his said annuity from the day of such decease.

Compensation to commissioners, clerk of the hanaper, &c.

LIII. And whereas the duties of the several persons now acting as commissioners of bankrupt in London, and the fees and emoluments accustomed to be received by them, will be abolished by the provisions of this act, and the clerk of the hanaper, purse-bearer, and other officers of the Lord Chancellor and of the High Court of Chancery, have been accustomed to receive certain fees, which will also be abolished by this act; and it may be just and necessary that in all or some of such cases compensation should be made in respect of such fees so to be abolished; be it enacted, That it shall be lawful for the lords commissioners of his Majesty's treasury, by examination on oath or otherwise, which oath they and each of them are and is hereby authorized to administer, to inquire into and ascertain the annual amount of the lawful fees and emoluments of such commissioners and other officers, received by them, and to award to all and every or such one or more of the said commissioners as they the said lords of the treasury shall deem to be entitled to the same, an annuity or annuities, of such an amount and for such term as the said lords of the treasury shall find to be a fair and reasonable compensation for the loss to be sustained by all or any of the commissioners and officers aforesaid, by the abolition of the said fees, and shall certify the amount of such annuity or annuities, in writing under their hands, to the Lord High Chancellor, who shall thereupon have power to order the amount so certified as payable to each commissioner or other officer, to be paid out of the moneys and securities to be standing to the said account to be intituled "The Secretary of Bankrupts' Compensation Account;" and the same shall be payable and paid accordingly to the respective

persons aforesaid, without any deduction whatsoever: provided always, that the annual sum to be so payable to any one of the said commissioners of bankrupt shall not exceed the sum of two hundred pounds, and shall not be paid to any such commissioner who at the commencement of this act, or at any time afterwards, shall hold any public office or employment of an annual value greater than the annuity to be so certified as payable to him, or be in the receipt of any yearly sum of money in lieu of or as a compensation for the proceeds of any such office or employment exceeding in amount such annuity, so long as any such office or employment shall be so held, or such sum of money shall continue to be received.

Proviso as to compensation to clerk of the hanaper.

LIV. Provided always, and it is hereby further enacted, That the annuity or compensation hereby directed to be made to the clerk of the hanaper shall be fixed and regulated upon the same computation and in like manner as is above provided with respect to the annuity or compensation for the patentee of the bankrupts' office.

Fees to be paid into the Bank by official assignee.

LV. And be it enacted, That for the purpose of raising a fund to meet the compensations hereinbefore directed to be made to the said patentees and commissioners of bankrupt, there shall be paid by the official assignee of each bankrupt's estate to be administered in the said Court of Bankruptcy, immediately after the choice of the assignees by the creditors, or so soon afterwards as a sufficient sum shall come into his hands for the purpose, over and beyond the sum hereinbefore directed to be paid by such official assignee, the sum of ten pounds, into the Bank of England, to the credit of the said accountant-general, to be carried to a separate account, to be intituled "The Secretary of Bankrupt's Compensation Account;" and in like manner there shall be paid to the said accountant-general, to be placed by him to the like account, by such official assignee, for every sitting of the said Court of Bankruptcy, or of any division judge or commissioner thereof, other than the sitting at which any person may be adjudged a bankrupt, or any sitting for the choice of assignees, or any sitting for receiving proofs of debt prior to such choice, or any sitting at which any bankrupt shall pass his or her last examination, or any sitting at which any dividend shall be declared, or any sitting at which the bankrupt's certificate shall be signed by the commissioners, the sum of one pound, and for every such sitting at which a dividend shall be declared a sum of money or fee according to the amount at such sitting ordered to be divided, such fee being regulated by the following scale, *videlicet*, for all sums not exceeding ten thousand pounds ten shillings in every one

hundred pounds, and for any excess above ten thousand pounds two shillings and sixpence in the one hundred pounds; such several payments to be made within one week after such sittings respectively shall be held; and all monies to be paid into the said last-mentioned account shall be subject to such general orders touching the payment in, investment, accounting for, and payment out of such monies for the purposes herein-before provided, as the Lord Chancellor shall from time to time think fit to prescribe; and when and as such last-mentioned compensations shall from time to time cease to be payable, it shall be lawful for the said Lord Chancellor, as he may see fit, to direct that lesser sums shall be paid by the said official assignees at the several times and for the purpose last aforesaid.

In case of a surplus in the secretary of bankrupts' account, the Lord Chancellor may order an abatement of fees.

LVI. And be it further enacted, That if at any time it shall appear to the Lord Chancellor that the monies and securities standing to the said account to be intituled "The Secretary of Bankrupts' Account," together with the fees expectant and to be payable to such account, shall be sufficient to answer and pay the several salaries and other payments for the time being chargeable thereon, and to leave a surplus applicable to the purpose after mentioned, it shall be lawful for the Lord Chancellor to order such abatement to be made in the fees herein-before made payable by the secretary of bankrupts, and by the said official assignees, or by either of them, to the said account to be intituled "The Secretary of Bankrupts' Account," as may to the said Lord Chancellor from time to time seem just and reasonable.

Remuneration to official assignee.

LVII. And be it enacted, That it shall be lawful for the commissioner before whom any person shall be adjudged a bankrupt in the said Court of Bankruptcy, or who shall appoint an official assignee under the power hereinbefore given for that purpose, to order and allow to be paid out of the bankrupt's estate, to the official assignee thereof, as a remuneration for his services, such sum of money as shall appear to such commissioner, upon consideration of the amount of the bankrupt's property, and the nature of the duties to be performed by such official assignee, to be just and reasonable.

Penalty on any officer taking fees.

LVIII. And be it enacted, That if any judge, commissioner, registrar, or deputy registrar, clerk, messenger, assignee, or any other officer or person whatsoever, shall, for any thing done or pretended to be done under this act, or any other act relating to bankrupts, or under colour of doing any thing under this act or any other such acts, fraudulently and wilfully demand or take, or appoint or allow any person whatsoever to take for him or on his account, or for or on account of any

person by him named, or in trust for him or for any other person by him named, any fee, emolument, gratuity, sum of money, or any thing of value whatsoever, other than is allowed by this act, and any other such act as aforesaid, such person, when duly convicted thereof, shall forfeit and pay the sum of five hundred pounds, and be rendered incapable, and is hereby rendered incapable, of holding any office or place whatsoever under his Majesty, his heirs or successors.

Offences against this act.

LIX. And be it enacted, That any such offender may be prosecuted either by information at the suit of his Majesty's Attorney General or by criminal information before his Majesty's Court of King's Bench, or by indictment: provided always nevertheless, that if any registrar, deputy registrar, clerk, messenger, or assignee, shall commit any offence against this act, it shall and may be lawful for the Court of Review or the Lord Chancellor to dismiss the person so offending, upon proof made before him or them of such offence having been committed, upon a rule to show cause; provided further, that if such Court, on cause being shown, shall think fit to direct an issue to be tried touching the matter of the said charge, such issue may be tried before the said chief judge or one of the other judges of the said Court of Review.

Judges and officers under this act ineligible to sit in Parliament.

LX. And be it enacted, That no judge, commissioner, registrar, or deputy-registrar, secretary of bankrupts, or official assignee, or other officer to be appointed by virtue of this act, shall, during their respective continuance in such offices, be capable of being elected or of sitting as a member of the House of Commons.

Commencement of this act.

LXI. And be it enacted, That this act shall commence and take effect from and after the passing thereof, as to the appointment of the judges and other officers hereby authorized, and as to all other matters and things, from and after the eleventh day of January next.

The FIRST SCHEDULE of Fees before referred to.

	£.	s.	d.
For every docket struck, and not acted upon	1	12	6
For every renewed fiat	0	12	0
For every petition of appeal answered for hearing	0	13	6
For every order on hearing	1	5	0
For every previous minute of order	0	3	6
For every warrant for advertising declaration of insolvency	0	2	6
For every certificate of a fiat issued to authorize advertisement in the Gazette	0	2	6
For every search made for fiat or other proceeding	0	1	0
For filing affidavits and other documents	0	1	0
For copies of affidavits, orders, and other proceedings, per folio of ninety words	0	0	1½

The SECOND SCHEDULE of Fees before referred to.

	£.	s.	d.
On filing every fiat	0	1	0
For every certificate of bankrupt's conformity	0	6	6
On entering every appeal for hearing in the Court of Review	0	2	0
For every order pronounced by that Court	1	5	0
For every previous minute or order	0	2	6
For entering every matter for hearing in a Subdivision Court	0	1	0
For every order pronounced there	0	5	0
For fees on the trial of every issue, to be paid by the successful party	2	0	0
For every search made in the Court	0	1	0
For filing affidavits, and other documents	0	1	0
For copies of affidavits, orders, and other proceedings, per folio of ninety words	0	0	1½
For every subpœna ad test. and other writ issued out of the Court	0	2	0

GENERAL

RULES AND ORDERS

FOR

REGULATING THE PRACTICE

OF THE

COURT OF BANKRUPTCY.

I.

IT is ordered that all affidavits and other documents directed to be filed in the Court of Bankruptcy be filed with the Registrars of the Court.

II.

That the Registrars' Office shall be at the Court of Commissioners of Bankrupts in Basinghall Street, in the city of London, and shall be kept open daily, Sundays only excepted, in the morning from 10 to 4, and in the evening from 7 to 9.

III.

That attornies and solicitors shall be admitted and enrolled in the Court of Bankruptcy by order of the Court of Review.

IV.

That every attorney and solicitor of any of the Superior Courts at Westminster may be admitted and enrolled in the said Court of Bankruptcy, upon the production of a certificate from the proper officer, and upon filing his own affidavit of his being such attorney or solicitor, and of the date of his former admission, such affidavit to be sworn by him, if residing in London, or within ten miles thereof, before the Court of Review, and if residing elsewhere, before a Master in ordinary or extraordinary in Chancery.

V.

That a Roll or Book shall be kept by the Registrars, where shall be enrolled the names of all attornies and solicitors admitted in the

Court of Bankruptcy, on payment to the Registrar of a fee of 5*s.* for such admission and enrolment. Such fee to be applied in the first instance to the payment of the expense of preparing such roll and the books necessary for the due registration of the names, and the surplus to the same purpose as the fees in the second schedule of the statute 1 & 2 Will. 4, c. 56.

VI.

That the Registrars or their Deputies shall forthwith cause to be prepared, a proper alphabetical book for the purposes after mentioned; and that the same shall be publicly kept at the Registrars' Office, to be there inspected by any such attorney or solicitor as aforesaid, or his clerk, without fee or reward, and that every attorney or solicitor admitted in the Court of Bankruptcy, and residing in London, or within ten miles thereof, shall, upon his admission, enter in such book, in alphabetical order, his name and place of abode, or some other proper place in London, Westminster, or the Borough of Southwark, or within one mile of the said office, where he may be served with notices, summonses, orders and rules, in matters depending in the said Court; and as often as any such attorney or solicitor shall change his place of abode, where he may be served as aforesaid, he shall make the like entry thereof in the said book; and that all notices, summonses, orders and rules, which do not require personal service, shall be deemed sufficiently served on such attorney or solicitor, if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney or solicitor shall neglect to make such entry, then the fixing up of any notice, or the copy of a summons, order or rule, for such attorney or solicitor, in the office of the Chief Registrar, shall be deemed as effectual and sufficient as if the same had been served at such place of residence as aforesaid.

VII.

All existing commissions, when transferred to the Court of Bankruptcy, shall be duly registered in the Registrars' Office, in books to be kept for that purpose, and shall be prosecuted before such Commissioner as the Court of Review shall appoint.

VIII.

That the Assignees appointed under such commissions shall be at

liberty to retain, until further order, the custody of the commission and proceedings heretofore taken thereon, according to the present practice in bankruptcy.

IX.

That all proceedings before the Commissioner in the Court of Bankruptcy shall be written on parchment or paper of one uniform size, and shall remain of record in the said Court.

X.

That every fiat issued by the Lord Chancellor, to be prosecuted in the Court of Bankruptcy, shall be filed of record in the Registrars' Office, within seven days from the date thereof, and that no appointment for the opening of any such fiat shall be made until it shall have been so filed.

XI.

That upon every application for an appointment for opening any fiat, the Registrar shall, in the presence of the solicitor applying for the same, allot such fiat, by ballot, to one of the commissioners of the Court, according to the regulations to be from time to time prescribed by the Court of Review, except in cases of second or renewed fiats, which shall go to the same commissioner before whom the former commission or fiat was prosecuted.

XII.

That upon the making of an appointment for opening any fiat, the Registrar shall, in the presence of such attorney or solicitor, write upon the face of the fiat the name of the Commissioner before whom the same is to be opened.

XIII.

That each fiat shall be prosecuted before the Commissioner so appointed, unless otherwise specially ordered by the Court of Review, or one of the Judges thereof.

XIV.

That the Commissioners shall sit daily (Sundays and holidays, to be hereafter named, only excepted), at 10 o'clock, at the Court of Commissioners of Bankrupts in Basinghall Street, and shall hold their Subdivision Courts at the same place as occasion may require.

XV.

That a Deputy Registrar shall attend upon each Commissioner to take minutes of, to draw up, and have the charge of, all proceedings before him, under the superintendence of the Chief Registrar.

XVI.

That in lieu of attaching a copy of the *Gazette* to the proceedings in each bankruptcy, the Deputy Registrar shall make a memorandum of the appearance of the advertisement in the *Gazette*, and of the date thereof, with proper reference to the file, to facilitate search.

XVII.

That the Official Assignees be divided equally among the Six Commissioners.

XVIII.

That each Commissioner shall appoint his class of Assignees to act in rotation under the several bankruptcies prosecuted before him; such rotation to be settled by ballot, according to such regulations as aforesaid, except in special cases to be referred by the Commissioner adjudicating therein to the other Commissioners of his Subdivision Court, or the Court of Review.

XIX.

That the same rules for the appointment of Official Assignees shall be followed as to existing commissions; but it is recommended, that no Official Assignee be appointed under commissions already opened, unless there appears good cause for so doing.

XX.

That the appointment of any Assignee or Assignees to any bankrupt's estate shall be under the hand of the Commissioner, and shall remain of record in the said Court of Bankruptcy; and certificates of such appointment, under the seal of the Court, shall be delivered to such Assignee by the Registrar, upon application for the same.

XXI.

That no Official Assignee shall either directly or indirectly carry on any trade or business, or hold or be engaged in any office or employment other than his said office and employment as Official Assignee.

XXII.

That each Official Assignee shall find sureties to the extent of £6,000, and shall, together with such sureties (except where otherwise especially directed by the Court of Review), execute a joint and several bond to the two Registrars for the time being, and the survivor of them, in the penal sum of £6,000.

XXIII.

The Official Assignees to be made liable to the whole amount, and the sureties to be liable together to the like amount, in such proportions as shall be approved of by the Court of Review, provided that no one surety shall be made liable for more than £3000, nor for less than £1000.

XXIV.

That each Official Assignee shall, on pain of his dismissal, give immediate notice, in writing, to the Chief Registrar for the time being, of the death or insolvency of either of his sureties; and shall, if required, cause a new bond to be executed to the like amount by another surety, to be approved of as above.

XXV.

That each Official Assignee shall follow the instructions of the Commissioner under whom he acts, according to the exigencies of each particular case, subject to such directions as shall from time to time be prescribed by the Court of Review.

XXVI.

That each Official Assignee shall pay into the Bank of England, to the credit of the Accountant-General of the High Court of Chancery, all such sums of money as shall come to his hands, as soon as they shall amount to £100; and at the time of paying in such monies shall state in writing, delivered therewith to the cashier of the Bank of England, the date and the amount of the payment, the name of the Official Assignee making it, the name and description of the bankrupt or bankrupts, and the particular estate to which the money belongs, and that it is to be placed to the credit of the said Accountant-General, and of such particular estate, and shall take a receipt for the same from the cashier of the Bank, and carry it to the office of the Accountant-General, who will give a proper voucher for such receipt, such voucher to be produced when called for by the commissioners.

XXVII.

That it is recommended to the Commissioners to allow the Official Assignees 1 per cent. on the monies they respectively receive, and 1½ per cent. more on the monies actually to be divided, subject nevertheless to be increased or diminished in any case under special circumstances to be referred to the Court of Review.

XXVIII.

That the Messengers shall, upon taking possession, forthwith take an inventory of the bankrupt's effects, but that no appraisement shall be made, or other expenses incurred, without the special direction of the commissioner, until after the appointment of the creditors' Assignees.

XXIX.

That a Table of Fees to be allowed to Messengers having in the year 1828 been approved of by the then Lord Chancellor, and the duties of Messengers having been since diminished, it is recommended to the Commissioners that all fees contained in that table, except the following, be for the future disallowed in the taxation of the Messengers' bills:—

	s.	*d.*
Attending the Commissioners until the adjudication for warrant of seizure	10	0
Executing the warrant at each place	13	4
Summons to bankrupt to surrender, and duplicate	5	0
Service of summons on bankrupt	6	8
Preparing advertisement for the Gazette, and copy, and attending with and for the same	6	8
Possession from the day of execution of the warrant of seizure to the choice of Assignees, and no longer, per day	5	0
Preparing warrant for bringing up the bankrupt from prison, attending Commissioner to sign the same, and service on the gaoler	13	4
Summons for Assignees to attend audit meeting	6	8
Preparing summonses, and serving same upon the Assignees	6	8
Proclaiming bankrupt, when he does not surrender to the commission	3	4
In case of committal by the Commissioners.		
Taking into custody, and executing their warrant, Messenger, and men's attendance, with coach-hire, and expenses	21	0

If, in execution of any of the business abovementioned, the Messenger and his man, or either of them, shall be compelled to travel any considerable distance from London, we submit, that besides the above fees, and in addition to travelling and other necessary expenses, an allowance should be made for the time employed at the following rate per day:—

	s.	*d.*
For the Messenger	6	8
For his man	5	0

XXX.

That all petitions presented to the Court of Review shall be entered at the Registrars' Office, and that the fiat directing the attendance thereon shall be under the seal of the Court of Bankruptcy, and that the original petition shall, when served, be returned to the Registrar on or before the hearing, and be filed of record, and that it shall not be necessary to recite such petitions at length in any order pronounced by the Court thereon.

XXXI.

That all the process of the Court of Review shall be under the seal of the Court of Bankruptcy.

XXXII.

That all agreements of reference, to be made rules of the Court of Bankruptcy, shall be so made by order of the Court of Review, and all matters arising thereon shall be heard and determined by the Court of Review.

XXXIII.

That all questions respecting the conduct of the officers and practitioners of the Court of Bankruptcy shall be brought before the Court of Review.

XXXIV.

That all recognizances to be taken and acknowledged in the Court of Bankruptcy shall be taken and acknowledged before the Court of Review.

XXXV.

That the practice in the Court of Review shall, until otherwise ordered, be conformed as nearly as may be to the present practice in matters before the Lord Chancellor.

XXXVI.

That the First Subdivision Court shall consist of Charles Frederick Williams, Joshua Evans, Robert George Cecil Fane, Esqrs.; and the Second Subdivision Court shall consist of John Herman Merivale, John Samuel Martin Fonblanque, and Edward Holroyd, Esqrs.

T. Erskine, C. J.
Albert Pell, J.
J. Cross, J.
G. Rose, J.

Approved, Brougham, C.

January 12, 1832.

Court of Review, Jan. 12, 1832.

It is Ordered, That all Commissions of Bankrupt heretofore issued and directed to the first and second lists of Commissioners of Bankrupt, shall, when removed into the Court of Bankruptcy, be prosecuted before Charles Frederick Williams, Esq.

All commissions directed to the 3d and 4th lists shall, in like manner, be prosecuted before John Herman Merivale, Esq.

All commissions directed to the 5th and 6th lists shall, in like manner, be prosecuted before John Samuel Martin Fonblanque, Esq.

All commissions directed to the 7th and 8th lists shall, in like manner, be prosecuted before Joshua Evans, Esq.

All commissions directed to the 9th and 10th lists shall, in like manner, be prosecuted before Edward Holroyd, Esq.

All commissions directed to the 11th list shall, in like manner, be prosecuted before Charles Frederick Williams, Esq., and Joshua Evans, Esq., or one of them.

All commissions directed to the 12th list shall, in like manner, be prosecuted before John Herman Merivale, Esq., and Edward Holroyd, Esq., or one of them.

And all commissions directed to the 13th and 14th lists shall, in like manner, be prosecuted before Robert George Cecil Fane, Esq.

Provided, that in the absence of any commissioner any other commissioner may sit for him.

By the Court.

Court of Review, Jan. 16, 1832.

It is Ordered, That all Petitions now depending before the Lord Chancellor in matters of Bankruptcy, may be set down for hearing in the Court of Review, upon motion for that purpose.

T. Erskine, C. J.
A. Pell, J.
J. Cross, J.
G. Rose, J.

Approved, and let my Secretary of Bankrupts attend the Court of Review with any petitions, copies of petitions, affidavits, or other documents, as the said Court may direct.

Brougham, C.

January 17, 1832.

Court of Review, February 2, 1832.

It is Ordered, That each Official Assignee shall present for acceptance all unaccepted bills of exchange, as soon as he shall receive the same, and before he deposits them in the Bank of England, as hereinafter directed.

That each Official Assignee shall deposit in the Bank of England, to the credit of the Accountant-General of the High Court of Chancery, all bills, notes, and other negotiable instruments, except unaccepted bills of exchange, as soon as he shall receive the same; and shall deposit in like manner all unaccepted bills of exchange, as soon as the same shall have been accepted, or refused acceptance; and shall at the time of such deposit leave a statement in writing with the Cashier of the Bank of England, specifying the date and contents of the instruments so deposited, the name of the Official Assignee making the deposit, the name and description of the Bankrupt or Bankrupts, and the particular estate to which the same respectively belongs; and that such instruments respectively are to be deposited to the credit of the said Accountant-General, and of such particular estate; and shall also take a receipt for the same from the Cashier of the Bank, and carry it to the office of the said Accountant-General, who will give a proper voucher, to be produced when called for by the Commissioners.

That when and as soon as any bill, note, or other negotiable instrument, deposited as aforesaid in the Bank of England in the name of

the Accountant-General, in pursuance of the statute 1 & 2 W. 4, c. 56, or of any order of the Lord Chancellor or the said Court, shall become due, the Governor and Company of the Bank of England shall, without any direction from the Accountant-General, deliver all such bills, notes, or other negotiable instruments, to one of the Cashiers of the Bank, who is to present the same for payment and receive the sums of money due thereon respectively, and forthwith to pay the sums so received (if any) into the Bank of England, to be there placed to the credit of the said Accountant-General, to the credit of the respective estates to which the said bills, notes, or other negotiable instruments were placed at the time of delivering the same to the said Cashier.

And in case the said bills, notes, or other negotiable instruments, or any of them, shall not be paid, the said Governor and Company of the Bank of England shall cause such bills, notes, and other negotiable instruments, as are by law required to be noted and protested, to be delivered to a notary for that purpose, and to be noted and protested accordingly; and shall, after the same shall have been so noted or protested, as the case may be, again deposit the same in the Bank of England to the credit of the said Accountant-General, and to the credit of the respective estates to which the same were placed at the time of delivering the same to the said Cashier.

And the said Governor and Company shall debit the account of each estate with such sums of money as shall be paid by them for the expenses of noting and protesting such bills, notes, or other negotiable instruments respectively as shall have been placed to the credit of such estate.

And the said Governor and Company of the Bank of England are forthwith, after every such receipt of money or deposit of any note, bill, or other negotiable security, to certify to the said Accountant-General the sum of money received (if any) on each such bill, note, or any such negotiable security, and placed to the credit of each such estate as aforesaid, or that such bill, note, or other negotiable instrument has been dishonoured, and been again deposited to the credit of such estate, as the cese may be, and the sum with which each such estate has been debited as aforesaid.

T. Erskine, C. J.
Albert Pell, J.
J. Cross, J.
G. Rose, J.

Approved, Brougham, C.

February 3, 1832.

Court of Review, February 15, 1832.

As to giving notice of dishonoured Bills.

It is further Ordered, That as often as any bill, note, or other negotiable instrument, that shall have come to the hands of any Official Assignee, shall be dishonoured, such Official Assignee shall forthwith give such notice thereof as is by law required from the holder of such bill, note, or other negotiable security respectively.

T. Erskine, C. J.
Albert Pell, J.
J. Cross, J.
G. Rose, J.

Approved, Brougham, C.

Court of Review, March 19, 1832.

Stating special circumstances in Report.

It is Ordered, That in all matters referred by this Court to any Judge or Commissioner of the Court of Bankruptcy, such Judge or Commissioner may in his report state such special circumstances as he shall think fit, without being specially directed so to do.

Investing money in Exchequer Bills.

And it is further Ordered, That any one of the Judges of the Court of Bankruptcy may, as often as it shall appear to him expedient, by order under his hand direct any money, which may have been paid into the Bank of England by any Official Assignee to the credit of the bankrupt's estate, to be invested in the purchase of Exchequer Bills; and may in like manner direct the sale or exchange of such Exchequer Bills, and also the exchange, sale, and transfer of any stock in the public funds, or in any public company, or of any Exchequer Bills, India Bonds, or other public securities, which shall have been transferred, delivered, or paid by any Official Assignee into the Bank of England to the credit of such estate; and may direct the proceeds thereof to be laid out in the purchase of Exchequer Bills, or to be carried to the credit of the Accountant-General of the High Court of Chancery, and of such bankrupt's estate: and the Accountant-General of the High Court of Chancery shall and may, pursuant to such order, make such purchase, sale, and transfer, without any further order or direction from this Court; and the expenses thereof may be charged to the account of the estate, for the benefit of which the same shall have been respectively made.

As to the payment of charges and expenses under the commission.

And it is further Ordered, That all sums of money which are by law payable out of any bankrupt's estate for allowance to the bankrupt, or for remuneration to the Official Assignee, or for the discharge of the solicitor's bill, or of any other lawful expenses incurred or payable by the assignees, shall and may, when duly settled and allowed, be paid out of the monies and securities so delivered and paid into the Bank of England as aforesaid, at such times and in such manner as any one of the Judges of this Court shall, by order under his hand, direct; provided that such order specify the amount of such payment, the purpose to which it is to be applied, and the person to whom, or to whose order, the same is to be made. And the Accountant-General of the High Court of Chancery shall and may, pursuant to such order, pay the sum of money specified therein out of such bankrupt's estate, without any further evidence of the same being due and payable, and without any further order or direction from this Court.

And it is further Ordered, That a duplicate of such orders shall be respectively filed with the proceedings in the Court of Bankruptcy *.

T. Erskine, C. J.
Albert Pell, J.
J. Cross, J.
G. Rose, J.

GENERAL RULE.

Court of Bankruptcy, Tuesday, 27th March, 1832.

As to sealing certificates of appointment of assignees in proceedings under a country *fiat*, see 1 & 2 *W.* 4. c. 56. s. 29.

It is hereby Ordered, That when any certificate of the appointment of an Assignee or Assignees, hereafter to be made in any bankruptcy prosecuted elsewhere, shall be brought to the Registrar of this Court, to be sealed pursuant to the act 1 & 2 *Will.* IV. c. 56, there shall be produced to him duplicate original certificates, written in the form hereinafter mentioned, with an affidavit of an attesting witness to the signatures to both; and that one of such duplicates, together with the affidavit,

* This order does not appear to have been approved by the Lord Chancellor; and perhaps there was no necessity for such approval, as to the greater part of it, under the construction of the 22d section of the 1 & 2 *W.* 4, c. 56. But *quære*, whether the first part of the order does not, unimportant as the matter is, in strictness require the Chancellor's consent, according to the construction of the 11*th section* of the above statute.

shall be left with the Registrar, to be filed of record; and the other, when so sealed, shall be returned to the party producing the same.

And it is further Ordered, That every such certificate shall (*mutatis mutandis*) be drawn up in the form following:—

"We the undersigned, being the major part of the persons duly authorized to act as Commissioners, in a prosecution of bankruptcy against *A. B.* by virtue of a fiat of the Lord High Chancellor, bearing date the day of in the year , do hereby certify, that *C. D.* and *E. F.* are this day duly appointed Assignees of the estate and effects real and personal of the said *A. B.*, pursuant to the statutes in such case made and provided.

"Given under our hands at this day of in the year

(Signed by three Commissioners.)

"To His Majesty's Court of Bankruptcy."

And it is further Ordered, That all such duplicates shall be signed, as often as circumstances will permit, at the meeting where such Assignees are appointed. And that no charge shall be allowed to any Commissioner for or in respect of any such certificate; nor shall the Registrar make any charge for or in respect of the sealing thereof, except the charge allowed by the said act for filing affidavits and other documents.

T. Erskine, C. J.
Albert Pell, J.
J. Cross, J.
G. Rose, J.

Approved this 27th day of March, 1832.
Brougham, C.

Court of Review, March 28, 1832.

As to the regulation of the dividend account at the Bank.

It is Ordered, That when a dividend has been or may be declared under any commission, and where any part of the bankrupt's estate shall have been paid into the Bank of England by any Official Assignee to the credit of the Accountant General of the High Court of Chancery and of such bankrupt's estate, any one of the Judges of this Court

may, by order under his hand, direct the sum ordered to be divided, or such part thereof as may be required, to be carried over from such account, to an account to be opened in the Books of the Bank of England, in the name of the same estate, to be intituled "The Dividend Account," in which order shall be specified the names of the Chief Registrar of the Court of bankruptcy for the time being, and of the Official Assignee appointed to such estate; and the Judge shall execute two parts of his said order, one part of which shall be filed and remain of record with the proceedings in such bankruptcy, and the other part shall be delivered by the Official Assignee to the said Accountant General, who shall thereupon by his certificate direct the sum specified in the Judge's order to be carried over as aforesaid, and shall in such certificate state the names of the Chief Registrar and Official Assignee mentioned in the Judge's order, and shall direct the cashiers of the Bank to pay the money so carried over to the drafts of the Official Assignee, countersigned by the Chief or other Registrar duly authorized to countersign the same, and such transfer shall be made accordingly, and the cashiers of the Bank shall, out of the monies so carried over, pay all drafts so drawn and countersigned as aforesaid.

Solicitor to make out a list of creditors after an order of dividend, and deliver it to the Official Assignee.

And it is further Ordered, That when any such order of dividend shall have been made, the solicitor to the commission shall forthwith make out a list of the creditors, and shall place in separate columns, after the name of each creditor, the amount of his debt, and the sum which he is entitled to receive in respect thereof, by virtue of such order of dividend, leaving another column in blank for the purpose hereinafter mentioned, and shall to each name prefix a number in regular series, and shall sign such list, and lay it before the Assignees chosen by the creditors, who shall examine and sign the same, and the solicitor shall then deliver the list to the Official Assignee, who shall examine and sign the same if correct, and shall take a copy thereof, and shall deliver the original to the Chief Registrar.

Regulations as to signing drafts for the payment of dividends;

And it is further Ordered, That the Chief Registrar shall upon the receipt of the said list, deliver to the Official Assignee books containing as many blank drafts and receipts as may be necessary, and in such form as shall from time to time be prescribed by this Court, and the Official Assignee shall number and fill up a draft for each dividend, by inserting in each draft the name of the creditor to which

the number of such draft is prefixed in the list, and the dividend payable to him; and the Official Assignee shall take the draft book so filled up to the Chief Registrar, who shall compare the same with the list in his possession, and shall sign all such drafts as he shall find correctly drawn, and in case of any error shall cancel such drafts as are incorrectly drawn, and fill up and sign others in lieu thereof, and shall return the draft book so signed to the Official Assignee for the purposes hereinafter mentioned, who shall thereupon number and fill up the receipts to correspond with the drafts so signed.

and the production of securities held by the creditor.

And it is further Ordered, That when any such creditor or any person duly authorized under his hand to receive his dividend shall apply for payment, the Official Assignee shall require the production of such securities (if any) as the creditor may hold for such debt, and, if satisfied that the amount of the said dividend still remains due, shall fill up the date in the draft and receipt; and upon the creditor, or such other person authorized as aforesaid, signing the receipt for such dividend, the Official Assignee shall mark the securities (if any) with the amount of that dividend, and shall sign and deliver the draft for the same; provided that no dividend shall be paid to any creditor holding any security for his debt until such security shall be produced, without the special directions of the Commissioner in that behalf.

Commissioner may alter lists and cancel drafts.

And it is further Ordered, That if, after such list shall have been so made and signed, it shall from any cause seem expedient and just to the Commissioner that such list should be altered, the said Commissioner may make such alterations as to him shall seem just, or may direct a new list to be made, and may thereupon cancel all such drafts (if any) as shall be thereby rendered useless, and direct other drafts to be drawn corresponding with the amended or new list (as the case may be), and the Registrar and Official Assignee shall thereupon fill up and sign such new drafts and pay the same to the several creditors as hereinbefore directed. Provided that every such alteration in the amount of a dividend shall be inserted in the blank column of such list, and shall be signed by such Commissioner, and that every new list shall be signed by the Commissioner and Official Assignee before any draft shall be drawn in pursuance thereof.

As to re-transfer of unappropriated funds.

And it is further Ordered, That when any part of the money so transferred by the said Accountant General shall become and remain unappropriated to the payment of any such dividend, the Commissioner may, by order under his hand, direct such residue to

be carried back to the account from which it was originally transferred, and the same shall thereupon be carried back accordingly, and a certificate of such transfer shall be sent to the office of the said Accountant General.

Provision for the signature of drafts on the death, &c. of the Chief Registrar.

And it is further Ordered, That when in consequence of the death, sickness, or unavoidable absence of the Chief Registrar, or for any other sufficient cause, it may be expedient to appoint some other person to sign drafts, or to do any other act hereby required from the Chief Registrar, any one of the Judges of this Court may, by order under his hand, to be executed in duplicate, name and appoint one of the Deputy Registrars to act for the Chief Registrar in that behalf, one part of which order shall be left by the Deputy Registrar named in such order at the Bank of England, who shall, at the same time, sign his name in the firm book kept at the Bank for such purpose, and the other part of such order shall be filed with the proceedings in that bankruptcy, and thereupon all drafts for that dividend signed by such Deputy Registrar shall be payable and paid, as if the same had been signed by the Chief Registrar named in the certificate of the said Accountant General.

Provision in case of the death, &c., of the Official Assignee.

And it is further Ordered, That when in case of the death, removal, sickness, or unavoidable absence of any Official Assignee named in the certificate of the Accountant General, any other shall be appointed to act in his stead, the Official Assignee so appointed shall leave at the Bank a certificate of his appointment under the seal of the Court, and shall at the same time sign his name in the said firm book, and thereupon all drafts for that dividend drawn and signed by such Official Assignee shall be payable and paid as if they had been signed by the Official Assignee named in the certificate of the said Accountant General.

One of the Judges may make any order as to the payment and delivery of monies, bills &c.

And it is further Ordered, That any one of the Judges of this Court may, from time to time, upon application made to him in that behalf, make such order relative to the payment and delivery in, investment, and payment and delivery out, of the monies, bills, securities, and other effects of any bankrupt, in the hands of any Official Assignee, or by him paid and delivered into the Bank of England, as to such Judge shall seem expedient and just, such order to be executed in duplicate, and one part thereof to be filed with the proceedings, and the other to be delivered to the Official Assignee.

Regulation as to the payment and re-investment of Exchequer Bills.

And it is further Ordered, That when, and so often as any Exchequer bill or bills deposited in the Bank of England to the credit of the Accountant General of the High Court of Chancery, and of the estate of any bankrupt, pursuant to the statute 1 & 2 *Will.* 4. c. 56, or to any order of this Court, shall be in course of payment, the Governor and Company of the Bank of England shall and may, without any direction from the Accountant General, cause all such bills so in course of payment to be delivered to one of the cashiers of the Bank, who is to receive the interest due thereon, and exchange the same for new bills, in case such new bills are issued, or otherwise to receive the principal money and interest due on such of the said bills so in course of payment as cannot be exchanged, and pay the said interest, or principal and interest (as the case may be), into the Bank of England, and deposit all such new bills in the Bank, to be there placed to the credit of the said Accountant General, and of the same bankrupt's estate to which the former bills were, at the several times of delivering the same to the cashiers for the purpose aforesaid, placed. And the said Governor and Company of the Bank of England are forthwith, after every such exchange and receipt of interest, or of principal and interest, to certify to the said Accountant General, without any direction from him for that purpose, the numbers, dates, and sums of the new bills taken in exchange, and the amount of the interest, or principal and interest (as the case may be), received on each bill, or set of bills, placed to the same account.

And it is further Ordered, That these orders be entered with the Registrar of this Court, and copies of them, signed by the Chief Registrar, be sent to the Accountant General of the High Court of Chancery, and to the Governor and Company of the Bank of England.

T. Erskine, C. J.
Albert Pell, J.
J. Cross, J.
G. Rose, J.

PRECEDENTS AND FORMS.

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PRECEDENTS AND FORMS.

THE FORM OF A PETITION TO BE ADDRESSED TO THE COURT OF REVIEW.

IN the Court of Bankruptcy.

In the matter of *A. B.*, a bankrupt.

To the Right Honourable the Chief Judge, and the other Judges of the Court of Review.

The humble petition of *C. D.*, &c.
Sheweth, that, &c.

PREAMBLE TO THE PROCEEDINGS, WHERE A COMMISSION ISSUED, AND ASSIGNEES WERE APPOINTED, BEFORE THE OPERATION OF THE BANKRUPTCY COURT ACT.

Proceedings in his Majesty's Court of Bankruptcy, under a commission of bankrupt under the Great Seal, dated the *first* day of *November*, 1831, against *A. B., late of Mark Lane, in the city of London, wine merchant, dealer, and chapman*, on the petition of *C. D.* of *Holborn, in the county of Middlesex, distiller*, by virtue of which commission the said *A. B. has been adjudged a bankrupt, and an assignment hath been duly made of his estate and effects to G. W. of, &c., merchant, and F. N. of, &c., factor*, since which the said commission has been removed into this Court according to the statute.

PREAMBLE WHERE A FIAT ISSUED AFTER THE COMMENCEMENT OF THE ACT.

Proceedings in his Majesty's Court of Bankruptcy, under the fiat dated the *thirteenth* day of *January*, 1832, against *A. B. of, &c., merchant, dealer, and chapman*, on the petition of *C. D. of, &c., insurance broker*, now filed and entered of record in the said Court.

DEPOSITION AS TO PETITIONING CREDITOR'S DEBT.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *twenty-first* day of *January*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B., of, &c., merchant*, against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued.

C. D., of, &c., broker, being sworn and examined at the time and

place above-mentioned before *Edward Holroyd*, Esquire, a commissioner of the said Court, upon his oath saith, that the said *A. B. was* on and before the *thirteenth* day of *January last*, and still *is* justly and truly indebted unto this deponent *in the sum of 200l., for goods sold and delivered by this deponent to the said A. B.*

Deposition as to the Trading.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *twenty-first* day of *January*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B. of, &c., merchant*, against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued

G. F., of, &c., gentleman, being sworn and examined at the time and place above mentioned before *Edward Holroyd*, Esquire, a commissioner of the said Court, upon his oath saith, that he has known the said *A. B.* for the space of *three years* now last past, during which time the said *A. B.* did use and exercise the trade and business of *a merchant, and did trade from this kingdom to Hamburgh and divers other places beyond the seas, by exporting and importing divers kinds of goods and merchandizes*, and sought and endeavoured to get *his* livelihood thereby, as others of the same trade and business usually do.

Deposition as to Act of Bankruptcy under the Third Section of the Bankrupt Act, by departing from his Dwelling-house.*

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *twenty-first* day of *January*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B.* of, &c. *merchant*, against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued.

G. F. of, *&c. gentleman*, being sworn and examined at the time and place above mentioned before *Edward Holroyd*, Esquire, a commissioner of the said Court, upon his oath saith, that *the above named A. B. on the —— day of —— last departed from and left his dwelling-house, situate in Mark Lane in the city of London, and hath not since returned to the same. And this deponent verily believes, that the said A. B. hath done so with intent to delay his creditors, because this deponent heard the said A. B. declare, on the day on which he so departed from his dwelling-house, that he was obliged to go from home for fear of being arrested by some of his creditors.*

* And see other forms under the Third Section in 2 Deac. B. L. 122 & seq.

DEPOSITION AS TO ACT OF BANKRUPTCY UNDER THE SIXTH SECTION OF THE BANKRUPT ACT, 6 GEO. 4, C. 16, BY DECLARATION OF INSOLVENCY.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *twenty-first* day of *January*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B. of, &c. merchant*, against whom a fiat bearing date the *thirteenth* day of *January*, 1832, was duly issued.

J. W. of, &c. gentleman, being sworn and examined, at the time and place above mentioned, before *Edward Holroyd*, Esquire, a Commissioner of the said Court, upon his oath saith, that the said *A. B.* on the *twenty-ninth* day of *December* last, in the presence of this deponent, made and signed a declaration that *he*, the said *A. B.*, *was* in insolvent circumstances, and unable to meet *his* engagements with *his* creditors. And this deponent further saith, that *the paragraph in the London Gazette of the tenth day of January instant, purporting to be signed by the said A. B. and attested by this examinant, is a true copy of the said declaration so filed as aforesaid, and that the said A. B., who is* named in the said Gazette as an insolvent, *is* the same person as the *said A. B. who is* named in the said fiat.

ADJUDICATION OF BANKRUPTCY.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *twenty-first* day of *January*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B.* of, &c. *merchant*, against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued.

I, *Edward Holroyd*, Esquire, a commissioner of the said Court, upon good proof upon oath before me this day taken, do find that the said *A. B.* became bankrupt, within the true intent and meaning of the statutes made and now in force concerning bankrupts, before the *thirteenth* day of *January* instant, being the day of the date and suing forth of the fiat against the said *A. B.* And I do therefore declare and adjudge *him* bankrupt accordingly.

APPOINTMENT OF OFFICIAL ASSIGNEE.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, the *twenty-first* day of *January*, 1832.

In the Matter of *A. B. of, &c. a Bankrupt.*

I hereby appoint *G. F. of, &c. merchant*, to be the official assignee, to act with the assignee or assignees to be chosen by the creditors of the said bankrupt.

T. W.
Deputy Registrar.

EDWARD HOLROYD,
Commissioner.

Advertisement of Adjudication, &c.

Whereas a fiat in bankruptcy is awarded and issued forth against *A. B. of, &c. merchant, dealer, and chapman*, and *he* being declared bankrupt *is* hereby required to surrender to *Edward Holroyd,* Esquire, a commissioner of his Majesty's Court of Bankruptcy, on the *seventh day of February and the fourth day of March*, 1832, at the Court of Bankruptcy, in Basinghall Street, London, and make a full discovery and disclosure of *his* estate and effects; when and where the creditors are to come prepared to prove their debts, and at the first sitting to choose assignees; and at the last sitting the said bankrupt *is* required to finish *his* examination, and the creditors are to assent to or dissent from the allowance of *his* certificate. All persons indebted to the said bankrupt, or that have any of *his* effects, are not to pay or deliver the same but to whom the commissioners shall appoint, but to give notice to *C. D. of, &c. gentleman.*

Warrant of Seizure.

Whereas a fiat in bankruptcy, dated the *thirteenth* day of *January*, 1832, hath been awarded and issued forth against *A. B. of Mark Lane, in the City of London, merchant, dealer, and chapman*, directed unto his Majesty's Court of Bankruptcy, and I *Edward Holroyd*, Esquire, a commissioner of the said Court, having begun to put the said fiat into execution, upon good proof, upon oath before me taken, have found that *he* the said *A. B.* did for *three years* last past use and exercise the trade of *a merchant, by trading from this kingdom to Hamburgh and other places beyond the seas, and by exporting and importing divers goods and merchandizes, and in buying* and selling the same in the way of *his said trade*, and have also found that *he* by reason of such dealings became indebted unto *R. D. of &c., broker, in the sum of* 200*l. for goods sold and delivered*, and being indebted as aforesaid, *he* the said *A. B.* became bankrupt to all intents and purposes, within the true intent and meaning of the statute made and now in force against bankrupts, before the date and issuing forth of the said fiat: these are therefore, by virtue of the said fiat and the statute in such case made and provided, to will and require, authorize and empower you and every one of you to whom this warrant is directed, forthwith to enter into and upon the house and houses of *him* the said *A. B.*, and also in all other place and places belonging to *him* the said *A. B.*, where any of *his* goods are, or are suspected to be, you shall seize all the ready money, jewels, plate, household stuff, goods, merchandize, books of accompts, and all things whatsoever belonging to *him* the said *A. B.*; and such things as you shall so seize you shall cause to be inventoried and appraised by honest men of skill and judgment, and the same you shall return to me with all convenient speed; and what you shall so seize you shall safely detain and keep in your possession until I shall give you orders for the disposal thereof; and in case of resistance, or of not having the key or keys of any door or lock belonging to *him* the said *A. B.*, where any of *his* goods are or are suspected to

be, you shall break open, or cause the same to be broke open, for the better execution of this warrant.

Given under my hand and seal this *twenty-first* day of *January*, in the year of our Lord one thousand eight hundred and *thirty-two*.

Signed, EDWARD HOLROYD.

To *W. W.*, messenger, and to his assistants, and to all mayors, bailiffs, constables, headboroughs, and all other his Majesty's loving subjects; whom I require to be aiding and assisting in the execution of this my warrant, as occasion shall require.

BANKRUPT'S SUMMONS.

Whereas a fiat in bankruptcy, dated the *thirteenth* day of *January*, 1832, has issued against you, *A. B., of &c., merchant, dealer, and chapman*, and you having been duly declared bankrupt by me, a commissioner of his Majesty's Court of Bankruptcy, I the said commissioner do hereby summon and require you the said *A. B.* personally to be and appear before me, the said commissioner, on the *seventh day of February and the fourth day of March*, 1832, at *ten* of the clock in the *fore*noon, at the Court of Bankruptcy, in Basinghall Street, London, then and there to be examined, and to make a full and true discovery and disclosure of all your estate and effects, according to the direction of the Act of Parliament now in force concerning bankrupts, made and passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act to amend the Laws relating to Bankrupts." And herein fail not at your peril.

Given under my hand this *twenty-first* day of *January*, 1832.

Signed, EDWARD HOLROYD.

To *A. B.*, the above-named bankrupt.

MEMORANDUM INDORSED ON THE BANKRUPT'S SUMMONS, TO PROTECT HIM FROM ARREST.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *twenty-first** day of *January*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B. of, &c., merchant, dealer, and chapman*, against whom a fiat bearing date the *thirteenth* day of *January*, 1832, was duly issued.

Be it remembered, that the within named *A. B.* came and surrendered *himself* to me, a commissioner of his Majesty's Court of Bankruptcy under the fiat issued against him, and submitted to be examined from time to time before me touching the discovery and disclosure of *his* estate and effects; but not being now prepared to make a full discovery and disclosure of *his* estate and effects, prayed further time for

* The surrender of the bankrupt at the *private* meeting entitles him to protection until he has passed his examination. *Ex parte Wood*, 1 Rose, 46.

that purpose, which I have granted accordingly, until the *4th* day of *March next*, at this place.

Signed, EDWARD HOLROYD.

FURTHER PROTECTION TO THE BANKRUPT, WHERE HIS EXAMINATION IS ADJOURNED.*

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *fourth* day of *March*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B.*, against whom a fiat, bearing date the *thirteenth* day of *January last*, was duly issued.

Be it remembered, that the said *A. B.* again came before me, but not being prepared, prayed further time, which was granted *him* accordingly, until the —— day of —— at this place.

Signed, EDWARD HOLROYD.

WITNESS'S SUMMONS.

By virtue of a fiat in bankruptcy, bearing date the *thirteenth* day of *January*, 1832, which has issued against *A. B. of Mark Lane, in the city of London, merchant, dealer and chapman*, directed to his Majesty's Court of Bankruptcy, These are to will and require you, and every of you, to whom this warrant is directed, personally to be and appear before me the said commissioner on the —— day of ————, at the Court of Bankruptcy, in Basinghall Street, London, then and there to be examined by me by virtue of the said fiat and the statute in such case made and provided. And hereof you are not to fail at your peril. Given under my hand this —— day of ————, 1832.

Signed, JOSHUA EVANS.

PROCEEDINGS AT THE FIRST PUBLIC MEETING.

BANKRUPT'S SURRENDER, AND ADJOURNED EXAMINATION.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *seventh* day of *February*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B. of, &c., merchant, dealer and chapman*, against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued.

Memorandum, that *A. B.*, against whom the *fiat* now in prosecution is awarded and issued, did, at the time and place above mentioned,

* See 6 *Geo.* 4, c. 16, s. 118, and 1 Deac. B. L. 537.

pursuant to notice in the London Gazette for that purpose, surrender *himself* to me, the commissioner appointed to proceed upon the said *fiat*, and submitted *himself* to be from time to time examined touching the discovery of *his* estate and effects, and in all things to conform *himself* according to the directions of the statutes in such case made and provided.

Signed, EDWARD HOLROYD.

The said *A. B.* being sworn and examined, at the time and place above mentioned, upon *his* oath saith, that *he is* not at present prepared to make a full disclosure and discovery of *his* estate and effects, but prays further time for the doing thereof, until the next day appointed in the London Gazette for that purpose, which is hereby granted accordingly.

Signed, EDWARD HOLROYD.

DEPOSITION BY A CREDITOR OF HIS DEBT, FOR WHICH HE HAS NO SECURITY.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *seventh* day of *February*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B.*, *of*, *&c.*, against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued.

C. D. of, &c., draper, being sworn and examined, at the time and place above said, upon *his* oath saith, that *A. B.*, the person against whom this *fiat* is awarded and issued forth, *was*, at and before the date and issuing forth of the said *fiat*, and still *is*, justly and truly indebted unto this deponent in the sum of £——, for which said sum of £——, or any part thereof, *he*, this deponent, hath not, nor hath any person by *his* order, or to *his* knowledge or belief, for *his* use, received any security or satisfaction whatsoever. *C. D.*

DEPOSITION OF DEBT DUE BY NOTES OR BILLS.

C. D. of, &c., grocer, being sworn and examined at the time and place aforesaid, upon his oath saith, that *A. B.*, the person against whom this *fiat* is awarded and issued forth, was, at and before the date and issuing forth of the said *fiat*, and still is, justly and truly indebted to this deponent, *and to E. F., this deponent's copartner in trade*, in the sum of £——, for which said sum of £——, or any part thereof, this deponent hath not, nor *hath his said copartner*, *or* any person by *their or either of their* order, or to this deponent's knowledge or belief, for *their or either of their* use, received any security or satisfaction whatsoever, except the *bills and notes* hereinafter mentioned.

C. D.

Note or Bill.	Date.	Drawer.	Acceptor.	Sum.	Payable to	When and how payable.	Indorsers.
				£. s. d.			
Bill ..	6 Sept. 1831.	Deponent and his Partner.	Bankrupt.	70 0 0	Deponent and his Partner.	Two Months after Date.	——
Bill ..	3 Oct. 1831.	J. B.	W. D.	40 0 0	Bankrupt.	Three Months after Date.	Bankrupt.

Deposition for Losses on Policies of Assurance.

C. D. of, &c., merchant, being sworn and examined at the time and place above said, upon *his* oath saith, that *A. B.*, the person against whom this *fiat* is awarded and issued forth, *was*, at and before the date and suing forth of the said *fiat*, and still *is*, justly and truly indebted
£500 to this deponent in the sum of £500, for *a total* loss of £100 per cent. on the bankrupt's subscription of £500 on a policy of assurance on the *ship Britannia*, on a voyage from *London* to *Jamaica*, on *ship and goods*, bearing date the *twentieth* day of *March*, 1831; for which said sum of £500, or any part thereof, this deponent hath not, nor hath any other person to *his* use, to this deponent's knowledge or belief, received any security or satisfaction whatsoever, save and except the said policy.

C. D.

Memorandum of Non-surrender of Bankrupt.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *seventh* day of *February*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B., of &c., merchant*, against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued.

Memorandum, that I, *Edward Holroyd*, Esquire, a commissioner of this Court, sat at the time and place above mentioned, pursuant to notice in the London Gazette for that purpose, but the said *A. B.* did not surrender *himself* to me, or make any disclosure or discovery of *his* estate or effects, or send any excuse why *he* did not.

Signed, Edward Holroyd.

Memorandum of the Choice of Assignees.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *seventh* day of *February*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B., of, &c., merchant*, against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued.

Memorandum.—This being the day appointed in the London Gazette

for the choice of assignees of the estate and effects of *A. B., of, &c., merchant,* the person against whom this *fiat* is awarded and issued, we whose names are hereunder written, being the major part of the creditors of the said *A. B.* present at this meeting, and who have proved our respective debts to the amount of ten pounds and upwards, have chosen and do hereby nominate and choose *J. W., of, &c., merchant,* and *G. O., of, &c., factor,* to be assignees of the estate and effects of the said *A. B.,* and we do desire that the said *J. W. and G. O.* may be appointed such assignees.

L. M.
N. O.
P. Q.
R. S.

I, *Edward Holroyd,* Esquire, a commissioner of the said Court, do hereby approve of and ratify and confirm the said choice, and appoint the said *J. W. and G. O.* assignees of the said estate and effects accordingly.

Edward Holroyd.

We accept the said trust and appointment.

J. W.
G. O.

Commissioner's Certificate of the Appointment of Assignees.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, the *twenty-fourth* day of *February,* 1832.

This is to certify, that *J. W.* and *G. O.* were this day duly chosen assignees of the estate and effects of *A. B.,* a bankrupt, and the said *J. W.* and *G. O.* having accepted the said trust and appointment, the said choice was approved of and ratified and confirmed by me the commissioner acting in the prosecution of the said bankruptcy.

Edward Holroyd,
Commissioner.

John Barnes,
Deputy Registrar.

Adjournment of the Choice of Assignees.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *7th* day of *February,* 1832, before *Edward Holroyd,* Esquire.

In the matter of *A. B., of, &c., merchant, dealer, and chapman,* against whom a fiat, bearing date the *13th* day of *January,* was duly issued.

Memorandum.—That this being the day appointed pursuant to notice in the London Gazette, for the choice of assignees under the fiat awarded and issued, and now in prosecution against *A. B., of, &c. merchant, dealer and chapman,* I, *Edward Holroyd,* Esquire, a commis-

sioner of the said Court, sat at the time and place above written, pursuant to such notice, to take the proof of debts and for the choice of assignees under the said *fiat*, but *the creditors present being desirous that the said choice of assignees* should be adjourned, I do adjourn the same until *Tuesday*, the *24th* day of *February* next, at this place, at *ten* of the clock of the same day.

Signed, EDWARD HOLROYD.

POWER OF ATTORNEY TO VOTE IN THE CHOICE OF ASSIGNEES.

Know all men by these presents, that we *C. D., E. F., and G. H., of Liverpool, in the county of Lancaster, bankers and copartners,* creditors of *A. B., of, &c., merchant, dealer and chapman,* the person against whom a *fiat* hath been duly awarded and issued and is now in prosecution, have made, ordained, constituted and appointed, and by these presents do make, ordain, constitute and appoint *W. P., of Fenchurch Street, in the city of London, grocer,* our true and lawful attorney for us, and in our names, places and steads to appear before the commissioner acting under the said *fiat*, at the time appointed in the London Gazette for the choice of assignees of the estate and effects of the said bankrupt, and then and there, for us and in our names, to vote in the choice of one or more assignee or assignees of the said bankrupt's estate and effects: And also, in case that we, or either of us, shall happen to be chosen assignee or assignees under the said *fiat* against the said bankrupt, then, as our said attorney, and for us or either of us, in our names or name, to accept the said trust: And further, to act, do and perform all and whatsoever shall be needful and requisite to be done in, about or concerning the premises: And we do hereby ratify, confirm and allow all and whatsoever our said attorney shall lawfully do, or cause to be done, for us, or either of us, by virtue of these presents and of the power and authority hereby to him by us given. In witness whereof we have hereunto set our hands and seals this *second* day of *February*, in the year of our Lord one thousand eight hundred and *thirty-two.*

Signed, sealed and delivered in the presence of
W. P.
T. P.

C. D.
E. F.
G. H.

Exhibited to me this *seventh* day of *February*, 1832, under a fiat against *A. B.*
Signed, *E. H.*

AFFIDAVIT OF SEEING POWER OF ATTORNEY EXECUTED.

In the matter of *A. B., of, &c.*, bankrupt.

W. P. of, &c., gentleman, maketh oath and saith, that he was present and did see *C. D., E. F., and G. H.*, duly sign, seal, and as *their several and respective* act and deed deliver the letter of attorney hereunto annexed, and that the names *C. D., E. F., and G. H., severally and respectively* set and subscribed against the seal of the said letter of attorney *are* of the *several and respective* proper handswriting of the said *C. D., E. F., and G. H.*, and that the names *W. P. and T. P.*, also *severally and respectively* set and subscribed at the bottom of the said

letter of attorney, as witnesses attesting the execution thereof, are of the respective proper handswriting of this deponent and *of the said T.P.*

W. P.

Sworn at *Liverpool*, this *second* day of *February*, one thousand eight hundred and *thirty-two*, before me,
Signed, *W. D.*
A Master Extraordinary, &c.

Exhibited to me this *seventh* day of *February*, 1832, *under a fiat* against *A. B.*
Signed, *E. H.*

Bankrupt's last Examination.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *fourth* day of *March*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B., of, &c., merchant, dealer, and chapman*, against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued.

A. B., the person against whom this *fiat* is awarded and issued, being come before me, *Edward Holroyd*, Esquire, a commissioner of the said Court, in order to make a full discovery and disclosure of *his* estate and effects, pursuant to the notice in the London Gazette for that purpose given, and being sworn and examined at the time and place above mentioned, upon *his* oath *saith*, that the several books* marked respectively with the letters *X. Y. Z., and the several paper writings hereunto annexed*, which are now produced and delivered up by this examinant, together with the goods and things seized by and under the said *fiat*, and the books, papers, and writings, securities for monies, goods, and effects delivered up by this examinant to the assignees chosen under the said *fiat*, together also with *a gold watch, two gold seals, and one diamond brooch, and 7l. 15s. in money*, do contain and are a full and true disclosure and discovery of all this examinant's estate and effects, both real and personal, and how and in what manner, and to whom and upon what consideration, and at what time or times he has disposed of or assigned or transferred any of his goods, wares, merchandizes, monies, or other estate and effects, and all books, papers, and writings relating thereto, or which he was possessed of, or was anywise interested in or entitled unto, or which any person or persons had or hath, or have had in trust for him, or for his use, at any time before or after the issuing of the *fiat*, or whereby this examinant and his family have or may have or expect any profit, possibility of profit, benefit and advantage whatsoever, (except only such part of his estate and effects as have really and bonâ fide been before sold or disposed of in the way of his trade and dealings, and except such sums of money as have been laid out in the ordinary expenses of himself and his *family*): And this examinant further saith, that at the time of this his examination, he has delivered up to the said commissioner, or unto the assignees under the said *fiat*, all such part of his goods, wares, and merchandize, money, estate, and effects, and all books, papers, and writings relating thereto as are now in his custody, possession, or

* These books should be exhibited to the commissioner.

power, (his necessary wearing apparel, and the necessary wearing apparel of his wife and children only excepted): And this examinant saith, that he has not removed, concealed, or embezzled any part of his estate, real or personal, nor any books of account, papers, or writings relating thereto, with an intent to defraud his creditors.

Signed, *A. B.*

Memorandum.—The above-mentioned *gold watch, seals, and brooch, and 7l. 15s. in money,* were, by the consent of the creditors present, returned to the bankrupt.

BANKRUPT'S BALANCE SHEET.*

Bankrupt Dr.	£.	s.	d.	Cr.	£.	s.	d.
Debts (as per List marked D., page .)				Debts due (see List C. page .)			
Capital				Property, exclusive of debts taken or to be taken by the assignees (see List P., page .)			
Profits				Losses (see List L. page .)			
				Expenses (see List E., page .)			
£				£			

D.

DEBTS DUE BY THE BANKRUPT.

Creditors' Names.	Residence.	£.	s.	d.

C.

DEBTS DUE TO THE BANKRUPT'S ESTATE.

Debtors' Names.	Residence.	Amount. £.	s.	d.	Any Set-off.	Good.	Bad.	Doubtful.

* See 2 Deac. B. L. 211, note (2).

P.

PROPERTY, EXCLUSIVE OF DEBTS, TAKEN OR TO BE TAKEN BY THE ASSIGNEES.

	£.	s.	d.

L. E.

Losses.	£.	s.	d.	Expenses.	£.	s.	d.

APPOINTMENT OF AUDIT.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *fourth* day of *March*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B., of, &c., merchant, dealer, and chapman*, against whom a fiat bearing date the *thirteenth* day of *January*, 1832, was duly issued.

Memorandum, that I, whose name is hereunto subscribed, being the commissioner authorized to proceed in this *fiat*, now in prosecution against *the above named A. B.*, having sat at the time and place above mentioned, pursuant to notice in the London Gazette, being the time appointed for the bankrupt's last examination, do hereby, in pursuance of the directions of an act of parliament, passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled, "An Act to amend the Laws relating to Bankrupts," appoint a public meeting to audit the accounts of the assignees of the said bankrupt, to be holden at the Court of Commissioners of Bankrupt, Basinghall Street, in the city of London, on *Thursday*, the *fifth* day of *April next*, at ten o'clock in the *fore*noon, whereof, and for the purport whereof, I do hereby direct my messenger to cause an advertisement to be inserted in the London Gazette twenty-one days previous to the said day hereby appointed for the said public meeting.

EDWARD HOLROYD,
Commissioner.

Audit of the Assignees' Accounts.*

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *Fifth* day of *April*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B. of, &c. merchant, dealer and chapman,* against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued.

Memorandum, that I, the undersigned, being the commissioner authorized to proceed upon a *fiat* awarded and issued against *A. B.*, having sat at the time and place above mentioned for the purpose of auditing the accounts of the assignees of the said bankrupt's estate and effects, when *C. D.* and *E. F.* appeared before me, and delivered in, upon oath, an account marked *X. and* now filed with the proceedings, as a full and true account of all their receipts and payments under the said *fiat*, and the times when the several sums of money were employed: And I, the said commissioner, having also examined the said accounts, and compared the receipts with the payments, do find that there is now a balance of £—— in the hands of the assignees, applicable to a dividend: And I do further find that the assignees have not, nor have or hath either of them, wilfully retained, or otherwise employed, any sum or sums of money, part of the estate of the said bankrupt, contrary to their covenant or to the directions of the acts relating to bankrupts.

And I do declare that the sum of £——, part of the said balance of £——, is a proper sum to be forthwith divided amongst the creditors entitled to the same, and that the sum of £—— be retained for the following purpose (that is to say) [*Here state the purpose for which the money is retained.*]

Signed, Edward Holroyd.

Audit at the Meeting to declare the First Dividend.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *twentieth* day of *April*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B. of, &c. merchant, dealer and chapman,* against whom a fiat, bearing date the *thirteenth* day of *January*, 1832, was duly issued.

Be it remembered, that I, the commissioner above named, being authorized to proceed on a *fiat*, issued against the said *A. B.*, sat at the time and place above mentioned to examine the accounts of *C. D. and E. F.*, assignees of the said bankrupt's estate, and having inspected the proceedings and examined the said *C. D. and E. F.* upon oath, I do

* See 2 Deac. B. L. 240.

find that the said *bankrupt* did upon his last examination disclose the following property, which has produced as follows:

Property disclosed.	Estimated.	Produced.	Remains to be received.	Observations.
	£. s. d.	£. s. d.	£. s. d.	
Stock.....				
Debts.....				
Furniture.....				
Fixtures.....				
Lease.....				
Real property				

And I do further find, that upon the whole the assignees recovered £——, that they duly paid £——, and that there is now a balance of £——, in *their* hands, and that they have not wilfully retained, or otherwise employed, any sum or sums, part of the estate of such bankrupt, contrary to *their* covenant, or to the directions of the acts relating to bankrupts: And I do declare that £——, part of the said balance of £——, is a proper sum to be forthwith divided amongst the creditors entitled to the same, and that the sum of £—— be retained for the following purpose (that is to say) [*Here state the purpose for which the money is retained*].

Signed, EDWARD HOLROYD.

DECLARATION OF FIRST DIVIDEND.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *twentieth* day of *April*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B., of, &c., merchant, dealer and chapman*, against whom a fiat, bearing date the *thirteenth* day of *January last*, was duly issued.

Be it remembered, that I, whose name is hereunto subscribed, being the commissioner authorized to proceed on a *fiat* now in prosecution against *A. B., of &c.*, having sat at the time and place above mentioned, in order to make a dividend of the estate of the said bankrupt, pursuant to notice in the London Gazette for that purpose given, and it appearing to me, by an examination of the proceedings and by a statement in writing delivered to me upon the oath of *C. D. and E. F.*

assignees of the said bankrupt's estate, that there is the sum of £—— now to be divided, which sum is composed as follows:—

	£.	s.	d.		£.	s.	d.
Gross sum received				Deduction to be made from gross sum received			
				Payments duly made			
				Sum ordered by me to be retained			
				£.			

Difference, being the sum to be divided, £. ——

And it also appearing to me that the debts proved and claimed, and now standing upon the proceedings, amount to the sum of £——, that is to say—

	£.	s.	d.
Debts proved			
Debts claimed			
	£		

And it also appearing to me that the sum of £——, so being in the hands of the assignees to be divided, is sufficient to pay all the creditors and claimants the sum of —— in the pound upon their several debts, I do therefore order a dividend of —— in the pound to be paid to all the said bankrupt's creditors who have proved their debts; and unto the claimants, when they shall have substantiated their claims, in proportion to their several debts; which said dividends, as I compute the same, will amount to the sum of £——. And I do find that the assignees have not, nor has either of them wilfully retained or otherwise employed any sum or sums, part of the estate of such bankrupt, contrary to their covenant or to the directions of the acts relating to bankrupts.

Signed, EDWARD HOLROYD.

ADJOURNMENT OF DIVIDEND.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *twentieth* day of *April*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B. of, &c.* against whom a fiat, bearing date the *thirteenth* day of *January last*, was duly issued.

Memorandum, that I, whose name is hereunto subscribed, being the commissioner authorized to proceed on this fiat awarded and issued and now in prosecution against *the above named A. B.* met at the time and place above mentioned, pursuant to notice in the London Gazette, in order to make a dividend of the said bankrupt's estate and effects; but *C. D. and E. F., the assignees of the said bankrupt's estate and effects, not being prepared with the necessary vouchers to authenticate their*

accounts, I do adjourn until the *fifth* day of *May next* at *ten* of the clock in the forenoon, at this place, for the purpose of making a dividend of the said bankrupt's estate and effects.

Signed, EDWARD HOLROYD.

DECLARATION OF A FURTHER DIVIDEND.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *sixth* day of *July*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B. of &c., Merchant, Dealer, and Chapman*, against whom a fiat bearing date the *thirteenth* day of *January, last*, was duly issued.

Be it remembered, that I whose name is hereunto subscribed, being the commissioner authorized to proceed upon a *fiat*, now in prosecution against *the above named A. B.*, having sat at the time and place above mentioned, in order to make a further dividend of the estate of the said bankrupt, pursuant to notice in the London Gazette for that purpose given; and it appearing to me by an order of dividend made the *twentieth* day of *April last*, that the assignees were ordered to divide amongst all the creditors of the said bankrupt, who have proved their debts, and unto the claimants when they should have substantiated their claims, the sum of —— in the pound, in proportion to their several debts; and that the assignees retained in their hands the sum of £——; and it further appearing to me by an examination of the proceedings, and by a statement in writing delivered to me upon the oath of *C. D. and E F.*, assignees of the said bankrupt's estate, that there is the sum of £—— now to be divided, which sum is composed as follows:—

Gross sum received.	£.	s.	d.	Deduction to be made from gross sum received.	£.	s.	d.
Retained at last dividend				Payments duly made			
Since got in				Sums ordered by me to be received			
Dividends retained upon Claims this day expunged							
£.				£.			

Difference, being the sum to be divided, £ ———.

And it also appearing to me that the debts proved and claimed on this and former days, and now standing upon the proceedings, amount to the sum of £ ——, that is to say,

	£.	s.	d.
Debts proved before this day			
Debts claimed before this day, and now standing on the proceedings			
Debts proved this day			
Debts claimed this day			
£.			

And it also appearing to me that the sum of £——, so being in the hands of the assignees to be divided, is sufficient to pay the creditors who have this day so proved or claimed, the said sum of —— in the pound, and to pay to all the creditors and claimants the further sum of —— in the pound upon their several debts; I do therefore order that the said dividend of —— in the pound shall be paid to or retained for such of the said bankrupt's creditors, who have this day proved or claimed. And I likewise order a further dividend of —— in the pound to be paid to all the said bankrupt's creditors, who have proved their debts, and unto the claimants, when they shall have substantiated their claims, in proportion to their several debts; which said dividends, as I compute the same, will amount to the sum of £——: And I do find that the assignees have not, nor has either of them, wilfully retained or otherwise employed any sum or sums, part of the estate of such bankrupt, contrary to their covenant or to the directions of the acts relating to bankrupts.

Signed, EDWARD HOLROYD.

DECLARATION OF A FINAL DIVIDEND.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *seventeenth* day of *October*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B. of &c., merchant, dealer, and chapman*, against whom a fiat bearing date the *thirteenth* day of *January*, was duly issued.

Be it remembered, that I whose name is hereunto subscribed, being the commissioner authorized to proceed on a *fiat* now in prosecution against *the above named A. B.*, having sat at the time and place above mentioned, in order to make a final dividend of the estate of the said bankrupt, pursuant to notice in the London Gazette for that purpose given; and it appearing to me by orders of dividend made respectively on the *twentieth* day of *April* and the *sixth* day of *July last*, that dividends to the amount of —— in the pound have been ordered to be paid to the creditors or retained for the claimants: And it further appearing to me by an examination of the proceedings and by a statement in writing delivered to me upon the oath of *C. D. and E. F.* assignees of the said bankrupt's estate, that there is the sum of £—— now to be divided, which sum is composed as follows:—

Gross sum received.	£.	s.	d.	Deduction to be made from gross sum received.	£.	s.	d.
Retained at last dividend				Payments duly made			
Since got in							
Dividends retained upon Claims this day expunged							
£.	——	——	——	£.	——	——	——

Difference, being the sum to be divided, £. ——.

And it also appearing to me that the debts proved on this and on former days amount to the sum of £ ——; that is to say,

	£.	s.	d.
Debts proved before this day . .			
Debts proved this day			
£			

And it also appearing to me that the sum of £ ——, so being in the hands of the assignees to be divided, is sufficient to pay the creditors who have this day so proved the said sum of ——in the pound, and to pay to all the creditors the further sum of —— in the pound upon their several debts, *and also to pay to the several creditors the amount of interest respectively due upon their several debts, pursuant to the law and practice in bankruptcy in cases of a surplus of the bankrupt's estate*:* I do therefore order, that the said dividends of —— in the pound shall be paid to such of the said bankrupt's creditors as have this day proved: And I do further order a final dividend of —— in the pound to be paid to all the said bankrupt's creditors who have proved their debts; which said dividends, as I compute the same, will amount to the sum of £ ——, leaving £—— and no more in the hands of the said assignees: And I do find that the assignees have not nor has either of them wilfully retained or otherwise employed any sum or sums, part of the estate of such bankrupt, contrary to their covenant, or to the directions of the acts relating to bankrupts.

Signed, EDWARD HOLROYD.

POWER OF ATTORNEY TO RECEIVE DIVIDENDS.

Know all men by these presents, that we *M. R. and W. F. of Liverpool, in the county of Lancaster, merchants and copartners,* creditors of *A. B. of &c., merchant, dealer, and chapman,* against whom a *fiat* hath been duly awarded and issued, and is now in prosecution, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint *R. L. of &c., factor,* our true and lawful attorney for us, and in our names, place and stead, and for our use, to ask, demand, sue for, recover, and receive of and from the assignee or assignees of the said bankrupt's estate and effects, or whom else it shall or may concern, all and every such sum and sums of money as now is, or are, or shall, or may hereafter become due or payable to us for or in respect of any dividends or dividend, share, or allotment, arising from or out of any division which shall or may be made, under the said *fiat*, of the said bankrupt's estate and effects on our said debt already proved, or hereafter to be proved by us, under the said *fiat*, and on receipt thereof or any part thereof, for us and in our names, to give, sign, seal, execute and deliver, all proper and necessary receipts, releases, and discharges for the same to the said assignee or assignees, as shall or may be lawful, fit, and proper to be given, signed, sealed, executed,

* The words in italics are only to be inserted, in case the bankrupt's estate does really produce a surplus.

and delivered: And further, to act, do, and perform all and whatsoever shall be needful and requisite to be done in, about, or concerning the premises: And we do hereby ratify, confirm, and allow all and whatsoever our said attorney shall lawfully do, or cause to be done, for us by virtue of these presents and of the power and authority hereby to him by us given. In witness whereof we have hereunto set our hands and seals this *twenty-fifth* day of *March*, in the year of our Lord one thousand eight hundred and *thirty-two*.

Signed sealed and delivered *in the presence of*
S. D.
E. O.

M. R. (*L. S.*)
W. F. (*L. S.*)*

Exhibited to me this —— day of ——, 1832,
Signed, Edward Holroyd.

Affidavit of the execution of the Power of Attorney.

In the matter of *A. B. of &c.*, a bankrupt.

S. D. of Liverpool, in the county of Lancaster, Gentleman, maketh oath and saith, that he was present and did see *M. R. and W. F. of &c.*, duly sign, seal, and as *their* several and respective act and deed deliver the letter of attorney hereunto annexed, and that the names *M. R. and W. F., severally and respectively* set and subscribed against the seal of the said letter of attorney are of the *several and respective* proper handswriting of the said *M. R. and W. F.*, and that the names *S. D. and E. O.*, also set and subscribed at the bottom of the said letter of attorney as witnesses attesting the execution thereof, are of the *several and* respective proper handswriting of this deponent and of *the said E. O.*

Sworn at *Liverpool, in the county of Lancaster*, this *twenty-fifth* day of *March*, one thousand eight hundred and *thirty-two*, before me

E. O.

Exhibited to me this —— day of ——, 1832.
Signed, Edward Holroyd.

* If the Power of Attorney is only to receive dividends, it seems sufficient to leave it with the assignees who pay the dividends.

List for Certificate.*

A List of the Creditors who have proved their Debts under the *Fiat* awarded and issued against *A. B. of, &c.*, and who have signed the Certificate of the said *A. B.*, bearing date the *first* day of *June*, 1832.

Figures stating the order in which the creditors stand upon the certificate.	List of Creditors who have proved Debts, according to the order in which they stand upon the Proceedings, the names of Partners being at full length.	Amount of all the Debts proved opposite to each Name upon the Proceedings.			Amount of all the Debts of the Creditors who have signed the Certificate, carried out opposite to their respective names.		
		£.	s.	d.	£.	s.	d.

N.B. The following Directions should be attended to:—

As to the Certificate.—1. Let the date of the signature be opposite to each name.

2. Let a partnership signature be signed by one partner for himself and partners, and not merely the partnership signature. Thus, *A. B.* for *C. D. and Co.*, not merely *C. D. and Co.*

As to the Affidavit.—1. The deposition of signature must contain the date of each signature.

2. Let an exhibit be written upon the deposition ready for the signature of the commissioner.

Memorandum as to computing the requisite value, viz. 4-5ths of the sum total. Multiply by 4 and divide by 5, thus—

Suppose the sum to be £446 5 10

4

5) 1785 3 4

£357 0 8 is 4-5ths.

* See 2 Deac. B. L. 274.

MEMORANDUM OF THE COMMISSIONER'S EXECUTION OF CERTIFICATE.

In the Court of Bankruptcy.

At the Court of Commissioners of Bankrupt, in Basinghall Street, London, on the *first* day of *July*, 1832, before *Edward Holroyd*, Esquire.

In the matter of *A. B., of &c.*, against whom a fiat, bearing date the *thirteenth* day of *January*, was duly issued.

Memorandum, that I, the commissioner above named, being authorized to proceed upon a *fiat* awarded and issued against *A. B. of &c.*, having examined the proceedings under the said *fiat*, and finding thereby and by affidavit exhibited before me, that full *four* parts in five in number and value of all the creditors who have proved their debts under the said *fiat*, amounting respectively to twenty pounds and upwards, have signed their consent that the commissioner should execute a certificate to *the Right Honourable the Chief Judge and the other Judges of the Court of Review* for the said bankrupt's discharge, according to the acts of Parliament for that purpose, I, the said commissioner, have accordingly executed such certificate.

Signed, EDWARD HOLROYD.

AFFIDAVIT OF FAIRNESS OF CERTIFICATE.

In the matter of *A. B.*, a bankrupt.

A. B., of, &c., the person against whom a *fiat*, bearing date the *thirteenth* day of *January*, one thousand eight hundred and *thirty-two*, hath been awarded and issued, by the name and description of *A. B., of Mark lane, in the city of London, merchant, dealer and chapman,* maketh oath and saith, that the certificate bearing date the *first* day of *June*, one thousand eight hundred and *thirty-two*, under the hand and seal of *Edward Holroyd*, Esquire, the commissioner authorized to proceed upon the said *fiat*, whereby he has certified to the *Right Honourable the Chief Judge, and the other Judges of the Court of Review*, that he this deponent hath in all things conformed himself to the several statutes made and *now* in force concerning bankrupts: And the consent of all this deponent's creditors who have signed their names or marks at the foot of the said certificate, that the said commissioner might sign and seal the same, and that this deponent might have such allowance and benefit as are given to bankrupts by the statute in such case made and provided, and be discharged from his debts in pursuance of the same act, was obtained fairly, and without fraud.

A. B.

Sworn at *the Court of Commissioners of Bankrupts, in Basinghall Street, London*, this *first* day of *July*, one thousand eight hundred and *thirty-two*, before me,

Signed, EDWARD HOLROYD.

Power of Attorney to sign Certificate.

Know all men by these presents, that *C. D. and E. F. of Newcastle upon Tyne, in the county of Northumberland, bankers,* creditors of *A. B., of &c.*, the person against whom a *fiat* hath been duly awarded and issued and is now in prosecution, having proved a debt of the amount of twenty pounds and upwards under the said *fiat*, as due to *us* from the said bankrupt, have made, constituted and appointed, and by these presents do make, constitute and appoint *W. G. of &c., Grocer,* our true and lawful attorney for *us* and in *our* name, place, and stead, as such creditors as aforesaid, to sign the certificate of conformity of the said *A. B.*, and thereby to testify and declare *our* consent that the commissioner authorized for that purpose may sign and seal the said certificate, and that the said *A. B.* may have such allowance and benefit as are given to bankrupts by the act of parliament made in the sixth year of the reign of his late majesty, intituled "An Act to amend the Laws relating to Bankrupts," and be discharged from his debts in pursuance of the said act: And further, to act, do, and perform all and whatsoever shall be needful and requisite to be done in, about, and concerning the premises: And *we* do hereby ratify, confirm, and allow all and whatsoever *our* said attorney shall lawfully do, or cause to be done for *us* by virtue of these presents and of the power and authority hereby to *him* by *us* given. In witness whereof we have hereunto set *our* hands and seals this *twentieth* day of *May,* in the year of our Lord one thousand eight hundred and *thirty-two.*

Signed, sealed and delivered in the presence of
W. P.
G. W.

C. D. (*L. S.*)
E. F. (*L. S.*)

Exhibited to me this —— day of ——, 1832.

Signed, Edward Holroyd.

Affidavit of Execution of the above Power of Attorney.

In the matter of *A. B. of &c.*, a bankrupt.

W. P. of &c., Gentleman, maketh oath and saith, that he was present and did see *C. D. and E. F.*, duly sign, seal, and as their *several and respective* act and deed, deliver the letter of attorney hereunto annexed, and that the names *C. D. and E. F. severally and respectively* set and subscribed against the seals of the said letter of attorney are of the *several and respective* proper handswriting of the said *C. D. and E. F.*, and that the names *W. P. and G. W.*, also set and subscribed at the bottom of the said letter of attorney as witnesses attesting the execution thereof, are of the respective proper handswriting of this deponent and of *the said G. W.*

Sworn at *Newcastle upon Tyne,* this —— day of ——, one thousand eight hundred and *thirty-two,* before me

W. P.

Exhibited to me this —— day of —— 1832.

Signed, Edward Holroyd.

Affidavit of seeing Creditors sign Certificate.

In the matter of *A. B. of &c.*, a Bankrupt.

M. W., of &c., maketh oath and saith, that he was present and did see *G. P., N. O., K. L., W. D., and T. P., five* of the creditors of the said bankrupt, severally subscribe their names and the day of the month and year on which they so subscribed their names, at the foot of a certain instrument in writing, purporting to be a certificate under the hand and seal of the commissioner authorized to proceed upon a *fiat* awarded and issued against the said *A. B.*, that the said *A. B.*, the bankrupt, hath in all things conformed *himself* to the several statutes made and now in force concerning bankrupts, at the date and suing forth of the said *fiat*, whereby they testify and declare their consent to the said commissioner signing and sealing the said certificate; and that the said bankrupt may have such allowance and benefit as are given to bankrupts by the act of parliament made and passed in the sixth year of the reign of his late Majesty, intituled, "An Act to amend the Laws relating to Bankrupts," and be discharged from *his* debts in pursuance of the same act.

M. W.

Sworn at *the Public Office in Southampton Buildings, London*, this —— day of ———— one thousand eight hundred and *thirty-two*, before me,

Exhibited to me this —— day of ————, 1832, under a *fiat* in bankruptcy against *A. B.*

Signed, Edward Holroyd.

Advertisement as to Allowance of Certificate.

Whereas the acting commissioner on a *fiat* in bankruptcy awarded and issued forth against *A. B. of &c.*, has certified to the *Right Honourable the Chief Judge and the other Judges of the Court of Review*, that the said *A. B.* hath in all things conformed himself according to the directions of an act of parliament made and passed in the sixth year of his late Majesty's reign, intituled, "An Act to amend the Laws relating to Bankrupts:" This is to give notice, that his Certificate will be allowed and confirmed as the said act directs, unless cause be shewn to the contrary on or before the —— day of ———— *next.*

NOTE:—*The following General Order appears to have been made some time between January* 12 *and January* 16, 1832.*

IT IS ORDERED, That the fiats upon a petition for hearing in the Court of Review, do direct the attendance of parties thereon to be on the eighth day from the day of presenting every such petition.

The petition to be served four days before the expiration of the time at which the attendance thereon is ordered, except in the cases of a petition presented to stay a certificate.

The above directions to be without prejudice to any application to the Court in respect of either the attendance of or service on parties, or the hearing of the petition.

T. ERSKINE, C. J.
A. PELL, J.
J. CROSS, J.
G. ROSE, J.

MEMORANDUM.

It is to be understood, that the eight days and four days respectively, in the directions abovementioned, be taken as inclusive of the days of presenting and of serving such petitions respectively, and exclusive of Sundays, although an intermediate day.

* See *ante*, Appendix, xxx, xxxi.

II & III William IV. c. 114.

An Act to amend the Laws relating to Bankrupts.

15th August, 1832.

6 G. 4, c. 16.

Whereas by an Act passed in the sixth year of the reign of his late majesty, intituled *An Act to amend the Laws relating to Bankrupts*, it is among other things enacted, that the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to Commissions of Bankruptcy, to be entered of record by a proper person to be appointed by the Lord Chancellor for that purpose, or by his deputy: and whereas the said Act contains no sufficient provision for making such depositions, or office copies of the record thereof, evidence, and is in other respects defective: and whereas by an Act passed in the first and second years of the reign of his present Majesty, intituled *An Act to establish a Court of Bankruptcy*, it is amongst other things enacted, that every fiat prosecuted in the said Court of Bankruptcy shall be filed and entered of record in the said Court: and whereas the said last mentioned Act contains no provision for the entering of record in the said Court fiats prosecuted elsewhere, and the depositions and proceedings under such fiats, or for the proof thereof: and whereas it is expedient that the record of all matters in bankruptcy should be under the same custody; be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, That the records of all commissions of bankrupt, and of all proceedings under the same, which may have been heretofore entered of record pursuant to or under colour of the said first recited Act or any other Act, shall be removed into the said Court of Bankruptcy, and shall be kept as records of the said Court in such place as the Judges of the said Court shall from time to time direct; and that it shall and may be lawful for the Judges of the Court of Bankruptcy

1 & 2 G. 4, c. 56.

Providing for the custody of records under former commissions of bankrupt.

to nominate the person heretofore appointed by the Lord Chancellor to enter such proceedings of record, or in case of his refusal to accept such office, some other fit and proper person, as the Clerk of Enrolment to the said Court, at such salary to be paid out of the fees herein-after mentioned, as the Lord Chancellor shall by writing under his hand direct; and that such Clerk of the Enrolments and his successors (to be appointed in like manner at the like salary) shall have the care and custody of all the said records so removed as aforesaid, and shall in like manner enter of record all matters and proceedings in bankruptcy, which by this Act, or by the said recited Acts, or by any order made in pursuance thereof, are or may be directed to be entered of record, upon payment of the fees herein-after mentioned.

Matters enrolled before September, 1825, deemed to be effectually entered of record.

II. Provided always and be it declared and enacted, That all commissions of bankruptcy issued before the first day of September one thousand eight hundred and twenty-five, and all depositions and other proceedings relating to such commissions directed to be enrolled, and actually entered of record upon or since that day, shall be deemed and taken to have been well and effectually entered of record.

Certificate of such entry to have the same effect as if commission had been issued after 1st September, 1825.

III. Provided nevertheless and be it further enacted, That the certificate of such entry, purporting to be signed by the person appointed to enter such proceedings, or by his deputy, shall have the same effect as if such commission had been issued after the said first day of September one thousand eight hundred and twenty-five, and shall be received in evidence without proof of the appointment or handwriting of such person.

Judges may order commissions to be entered on record.

IV. And be it enacted, That any one of the Judges of the Court of Bankruptcy shall have full power and authority, upon application made to him for that purpose, to direct such officer to enter upon the records of the Court any commission of bankrupt at any time heretofore issued, and the depositions and proceedings had and taken under the same, or such part or parts thereof as such Judge shall think fit: Provided always, that it shall and may be lawful for such officer to enter of record the several matters directed by the said recited Acts or either of them to be entered of record, upon the application of or on behalf of any party interested therein, without any special order for that purpose.

Certain matters may be entered on application of parties.

Fiats to be entered of record on application of any interested party.

V. And be it further enacted, That all fiats already issued, or hereafter to be issued, in lieu of commissions of bankrupt, to be prose-

cuted elsewhere than in the said Court of Bankruptcy, and all adjudications of bankruptcy by the persons named in such fiats to act as commissioners, and all appointments of assignees, and certificates of conformity, made and allowed under such fiats, may and shall be entered of record in the said Court of Bankruptcy, upon the application of or on behalf of any party interested therein, on the payment of the fees hereafter mentioned, without any petition in writing presented for that purpose; and that any one of the Judges of the said Court may, upon petition, direct any deposition or other proceeding under such fiat to be entered of record as aforesaid,

Fee for entry of commissions, fiats, and other matters.

VI. And be it further enacted, That there may and shall be paid for the entry of every commission and fiat the fee of two shillings, and for the entry of every certificate of conformity, and of every assignment the fee of six shillings each, and for the entry of every examination such fee as the Court of Review shall from time to time fix and appoint, not exceeding the rate of one shilling for every folio thereof, and for the entry of every adjudication of bankruptcy, deposition, appointment of assignees, and every other proceeding or matter relating to commissions or fiats, the fee of two shillings each; which fees shall be paid to the chief registrar for the time being, and shall be applied by him to the payment of the expenses of such enrolment and the salary of such officer; and the balance thereof, if any, shall be applied to the payment of such other expenses attending the said Court of Bankruptcy as the Judges thereof, with the consent of the Lord Chancellor, shall from time to time direct.

Provision in case of the death of witnesses deposing to the debt, trading, or act of bankruptcy.

VII. And be it further enacted, That in the event of the death of any of the witnesses deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any commission or fiat already issued or hereafter to be issued, it shall be lawful for the assignees appointed under such commission or fiat, and for all persons claiming through or under them, or acting by or under their authority, in the cases hereafter mentioned, to produce and read in evidence in all courts of civil judicature, and in all civil proceedings, in maintenance and support of such commission or fiat, any deposition of such deceased witness relative to such petitioning creditor's debt, trading, or act of bankruptcy, which shall have been duly entered of record pursuant to the provisions of the said recited Acts or of this Act; and the production or reading of such depositions, or of any copy thereof, duly authenticated according to the provisions of the said

recited Acts or of this Act, shall have the same effect, as if the matters alleged therein had deen deposed to by the same witness in such court according to the ordinary course and practice thereof: Provided always, that the before mentioned depositions shall be read in evidence in such cases only, where the party using the same shall claim, maintain, or defend some right, title, interest, claim, or demand, which the bankrupt might have claimed, maintained, or defended, in case no commission of bankrupt or fiat had issued, and shall not be read in evidence in any action or proceeding now pending, by which the validity of any commission or fiat is or may be brought into question.

No fiat to be received in evidence unless first entered of record.

VIII. And be it further enacted, That no fiat issued or to be issued in lieu of a commission of Bankrupt, whether prosecuted in the Court of Bankruptcy or elsewhere, nor any adjudication of bankruptcy, or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the Court of Bankruptcy as aforesaid.

Proceedings in bankruptcy purporting to be sealed with the seal of the Court, to be received as evidence.

IX. Provided always and be it further enacted, That upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid, without any further proof thereof: Provided nevertheless, that all fiats and proceedings under the same, which may have been entered of record before the passing of this Act, shall and may, upon the production thereof, with the certificate thereon purporting to be signed by the person so appointed to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same having been duly entered of record, any thing herein contained notwithstanding.

Lord Chancellor empowered to direct certain monies standing to the credit of the Secretary of Bankrupts' Account to be carried to "the Secretary of Bankrupts'

X. And whereas by the said recited Act of the first and second years of the reign of his present Majesty it is amongst other things enacted, that several sums therein specified shall be paid into the Bank of England, to the credit of the Accountant-General of the High Court of Chancery, to an account to be intituled "The Secretary of Bankrupts' Account," and that all monies so paid shall be

Compensation Account," and *vice versâ*.

subject to such general orders for the purposes therein specified as the Lord Chancellor shall prescribe; and it is further enacted, that compensation shall be made to certain officers therein named, in lieu of certain fees and emoluments by the said Act abolished, and that for the purpose of raising a fund to meet the said compensation, certain sums in the said Act specified shall be paid into the Bank, to the credit of the said Accountant-General, to a separate account to be intituled "The Secretary of Bankrupts' Compensation Account:" And whereas the sums paid in to the credit of the said first account are more than sufficient to meet the sums at present payable out of the same, and the sums paid in to the credit of the second mentioned account are at present insufficient to meet the payments directed to be made out of the same, and it may be expedient that power should be given to the Lord Chancellor to apply one of those funds in aid of the other from time to time as occasion may require; be it therefore enacted, That it shall and may be lawful for the Lord Chancellor by his order to direct from time to time as he may see fit, that the monies standing to the credit of the account intituled, "The Secretary of Bankrupts' Account," or so much thereof as he may find to be necessary, shall be carried over by the said Accountant-General to the credit of the account intituled, "The Secretary of Bankrupts' Compensation Account," and the same when so carried over shall and may be applied in satisfaction of any sum or sums charged upon or made payable out of the said last mentioned account; and in like manner to direct from time to time as he may see fit, that the monies standing to the credit of the account intituled, "The Secretary of Bankrupts' Compensation Account," or so much thereof as he may find to be necessary, shall be carried over by the said Accountant-General to the credit of the acccount intituled, "The Secretary of Bankrupts' Account," and the same when so carried over shall and may be applied in satisfaction of any sum or sums charged upon or made payable out of the said last mentioned account.

XXXIX. And be it further enacted, That it shall be lawful for the said Treasurer or Deputy Treasurer for the time being of the aforesaid hospital, or their or either of their Deputy or Deputies to be by them or either of them for such purposes nominated or appointed by deed or writing under their or either of their hands or hand, for and on behalf and in the name or names of the said Treasurer or Deputy Treasurer for the time being, or either of them, or for and on behalf and in the name or names of the Commissioners for the time being of the said hospital, or any of them, to appear before the Commissioners or major part of the Commissioners named or to be named in any commission or commissions of bankrupt, in any public or private meetings of such Commissioners under any such commission or commissions of bankrupt, and to prove the amount of all prize or bounty money, grant, or monies, or balances of prize or bounty money, grant, or monies, or other allowances of money in the nature thereof, in the hands, custody, or power of or unpaid by such bankrupt or bankrupts respectively, at the date and issuing of any such commission of bankrupt, in or to which the said hospital, or the army generally, or any division or divisions, battalion or battalions, regiment or regiments, individual or individuals of the army, shall be interested or entitled under the several acts of parliament already enacted and now in force, or at any time hereafter to be enacted or become in force, and to make every such proof and proofs of debt upon the oath or affirmation, as the case may require, of such Treasurer or Deputy Treasurer of the said hospital for the time being, or of any clerk or clerks or other officer or officers of the said hospital, conversant or acquainted with the books and affairs of the said hospital, who shall swear or affirm as to the amount of such prize, bounty, grant, or other monies, or balances of prize, bounty, grant, or other monies, of which such proof shall be so tendered, to the best of his or their knowledge and belief, after an examination of the books of the said hospital relating thereto, or by a production of the books of the said hospital, or by a production of the certificate of the examiner of prize accounts, or by a production and examination of the book or books of such bankrupt or bankrupts, or the personal examination on oath of such bankrupt or bankrupts respectively under such commismission or commissions of bankrupt, and which production or examination of the bankrupt's books and accounts, and of such bankrupt or bankrupts themselves, the said Treasurer or Deputy Treasurer, or such other person or persons as they or either of them shall so appoint as aforesaid, are hereby authorized and empowered to

Treasurer or his Deputy empowered to prove debts due to the hospital;

require, or, in default of such evidence, then by such other evidence as to the said Commissioners named and authorized in every such commission of bankrupt under which such proof shall be tendered, or the major part of them, shall under the circumstances seem reasonable; the making of every such proof nevertheless to be liable to such opposition, and every such proof, when made, liable to be expunged in the same way and upon the same evidence as any other proof or proofs of debt by any other person or persons claiming to prove or having proved under such commission or commissions of bankrupt respectively; and also to receive and take, and to give good and effectual discharges for, all and every dividend and dividends payable or to become payable by or out of the estate and effects of such bankrupt or bankrupts, or any part thereof, upon the amount of any and every such proof of debt under such commission; and also to vote in the choice of any assignee or assignees of the estate and effects of every such bankrupt for the whole sum proved; and also to assent to or dissent from the signing and allowing the certificate or certificates of every such bankrupt; and further, to have and exercise every other right, authority, and power whatsoever in respect of the estate and effects of every such bankrupt, or the sale or disposition thereof, and otherwise to act therein, or in any matter relating thereto, in the same manner and to the same extent as any other creditor of such bankrupt proving a debt to a like amount under such commission or commissions of bankrupt respectively might or could do; and also to come in and receive, and give legal and effectual discharges for, any dividend or dividends payable or to become payable by or out of the estate and effects of any insolvent debtor or debtors who at the time of his or their presenting any petition or petitions for his or their discharge or discharges from prison, under the several acts now in force for the relief of insolvent debtors, or hereafter to come in force, shall have any prize, bounty, grant, or other money or monies, or balances of prize, bounty, grant, or other money or monies, in his or their respective hands, in or to which the hospital, or the army generally, or any division or divisions, battalion or battalions, regiment or regiments, individual or individuals of the army shall be so interested or entitled as aforesaid, and also to appear upon and oppose or consent to any such petition of discharge, and in all other respects to have and exercise every right, power, and authority, in the same manner and to the same extent as any creditor or creditors of such insolvent debtor or debtors for a like amount.

and to give discharges;

and to vote for assignees: and to assent to the allowing of certificates.

Deputy Treasurer also to act on behalf of the hospital in cases of insolvency.

MEMORANDA.

1832.
January 11.

THIS being the first day of Hilary Term, the new Court of Bankruptcy constituted by the recent Act of 1 & 2 *William* 4, c. 56, was opened, pursuant to the provisions of that statute.

The four Judges came down to Westminster-Hall with the Judges of the other Courts, and then proceeded to the Committee-Room, No. 12, where, by permission of the Speaker of the House of Commons, it was intended the Court should sit until another was prepared for that purpose.

The Judges took their seats on the bench in the following order, having previously taken the oaths of allegiance and supremacy, and the oath of office, before the Lord Chancellor:—

The Right Hon. THOMAS ERSKINE, Chief Judge.

Sir ALBERT PELL, Knight,
Sir JOHN CROSS, Knight,
Sir GEORGE ROSE, Knight,
} Judges.

His Honor the CHIEF JUDGE then said, that his Majesty having been graciously pleased, pursuant to an act of parliament passed in the last session, to constitute a new Court of Justice, to be designated by the name of "The Court of Bankruptcy;" and having also been graciously pleased to appoint his three learned friends and himself to be Judges of the said Court, and certain

other gentlemen to be Commissioners in it; and the statute having, from and after this date, vested in the Judges of the Court the powers and jurisdiction of the Lord Chancellor in matters of bankruptcy, it had been thought most advisable to give authentic publicity to the establishment of the Court, by having the Letters-Patent constituting it, and appointing its members, read.

The Letters-Patent were then read by the Chief Registrar, Mr. Serjeant EDWARD LAWES, and were as follow:—

"WILLIAM THE FOURTH, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, to all to whom these Presents shall come greeting, Whereas by an Act of Parliament, passed in the first and second year of our reign, intituled, *An Act to establish a Court in Bankruptcy*, it is, amongst other things, enacted, that it shall and may be lawful for us, our heirs and successors, by Charter or Letters-Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, to erect and establish a Court of Judicature, which shall be called the "Court of Bankruptcy," and by commission under the Great Seal to appoint one person to be the Chief Judge, and three other persons to be other Judges of the said Court, and six other persons to be called Commissioners of the said Court, being respectively of such standing at the Bar and so qualified as is by the said Act required: NOW KNOW YE, that We, of our especial grace, certain knowledge, and mere motion, and in pursuance of the said Act of Parliament, have erected and established and by these Presents do erect and establish a Court of Judicature, which shall be called the Court of Bankruptcy, and we do hereby direct and constitute the said Court to be a Court of Record, which said Court, together with every Judge and Commissioner thereof, shall have, use, and exercise all the rights, incidents, and privileges, and shall have and enjoy all the power, jurisdiction and authority given and granted by the said Act of Parliament, and we do hereby

will, ordain, and grant, that the said Judges and Commissioners shall hold their respective offices during their good behaviour. And We do further give and grant to the said Judges and Commissioners rank and precedence in all our Courts of Law and Equity in manner following, that is to say, to the Chief Judge of the said Court for the time being, rank and precedence next after the Puisne Judges of our Courts of King's Bench, Common Pleas, and Exchequer, for the time being respectively, and to the other Judges of the said Court of Bankruptcy for the time being, rank and precedence next after our said Chief Judge of the said Court for the time being, and to the Commissioners (*a*) of the said Court for the time being, rank and precedence next after our said other Judges of the said Court for the time being. And We do hereby declare that the said Judges of the said Court of Bankruptcy, except our said Chief Judge, shall take rank and precedence among themselves, and the said Commissioners shall take rank and precedence among themselves, respectively, according to the priority or order of their respective appointments. And further know ye, that We do by these Presents constitute and appoint our trusty and well-beloved Thomas Erskine, Esquire, one of our Counsel learned in the law, to be the Chief Judge of the said Court, and We do hereby constitute and appoint our trusty and well-beloved Albert Pell, one of our Serjeants at Law, John Cross, one other of our Serjeants at Law, and Attorney-General for our County Palatine of Lancaster, and George Rose, Esquire, one of our Counsel learned in the law, to be the other Judges of the said Court. And We do hereby constitute and appoint our trusty and well-beloved Charles Frederick Williams, Esquire, one other of our Counsel learned in the law, John Herman Merivale, Joshua Evans, John Samuel Martin Fonblanque, Robert George Cecil Fane, and Edward Holroyd, Esquires, Barristers at Law, to be the Commissioners of the

(*a*) This is a most extraordinary addition to the grant contained in the Letters-Patent. It surely was never intended that the six *Commissioners* of the Bankrupt Court should take rank above the Attorney and Solicitor Generals, and the several Masters in Chancery; and yet the words of the Patent do unquestionably give them that precedence.

said Court. And our will and pleasure is that the said Court, together with every Judge and Commissioner thereof, hereby and hereafter to be appointed, shall have, use, and exercise all the rights, incidents, and privileges, and shall have and enjoy all the power, jurisdiction, and authority given and granted by the said Act of Parliament, and shall be subject to the rules, regulations, and restrictions therein mentioned. In witness whereof We have caused these our Letters to be made Patent. Witness ourself at Westminster, the fifth day of December, in the second year of our reign.

By Writ of Privy Seal.

BATHURST."

After the reading of the Letters-Patent, the Chief Judge said, that the statute, under which this Court had been established, requiring that the several attornies practising in it should be admitted as members of it, a rule had been made, that the attornies to be admitted as members of the Court of Bankruptcy must be admitted before the Court of Review, which would accordingly sit for that purpose, and for the dispatch of other business, at that place, at ten o'clock the following day. And he further intimated, that the Commissioners would also on the same day commence their sittings for the transaction of business at the Court in Basinghall Street.

January 12. *His Honor the* CHIEF JUDGE, at the sitting of the Court this day, handed to the Registrar the Rules and Orders (*a*) which he and the other Judges, with the sanction of the Lord Chancellor, had made to regulate the practice of the Court, and which he desired the

(*a*) See *ante*, p. xxiii.

Registrar would now read aloud to the attornies who were waiting to be sworn.

After the reading of the above-mentioned Orders, one of the attornies present applied to the Court to know whether each attorney was liable to pay the sum of *25s.* on obtaining his order of admission, or only the sum of *5s.*, when the Chief Judge informed him that the subject had been already considered by the Court, and that the latter sum would be alone demandable.

The Chief Judge also informed the Practitioners that it would not be necessary for them to take the Oaths of Allegiance and Supremacy, but merely to swear that they were duly admitted Attornies of one of the Courts of Westminster, after which, upon application at the Registrars' Office, they might receive their Certificates of Admission to practise in this Court.

A number of attornies were then sworn on their respective affidavits to the effect above mentioned.

The Court this day proceeded further in the admission of attornies. *January* 13.

The Registrar, by direction of the Chief Judge, read the Order of the Court for the disposal of the Commissions actually working before the old Lists of Commissioners, at the commencement of the operation of the new statute (*a*).

Henry William Tancred, Esquire, having been recently appointed one of his Majesty's Counsel learned in the law, presented himself this day to the notice of the Court, and was called upon by the Chief Judge to take his seat within the bar in the usual form.

(*a*) See *ante,* p. xxx.

CASES

ARGUED AND DETERMINED

IN

The Court of Bankruptcy,

IN

HILARY TERM,

IN THE

SECOND YEAR OF THE REIGN OF WILLIAM IV.

Westminster.

1832.
January 14.

In the matter of SAMUEL APPLING.

This Court has no jurisdiction to hear petitions addressed to the L. C. (*a*).

A PETITION in this matter had been addressed to the Lord Chancellor, which had been answered and was standing in his Lordship's paper when the new Bankruptcy Court Act began to operate.

Mr. *Montagu* said that he was placed in a difficulty with respect to this petition, which he wished to state to the Court, as upon the decision that might be come to in this case would depend the fate of many others. There were various petitions in the paper of the Lord Chancellor and of the Vice Chancellor, which it would be very convenient to the parties to have heard by this Court, if it was considered they were within its jurisdiction, and that such a proceeding would be consistent with its practice.

(*a*) But see the subsequent Order, 16 & 17 January, *ante*, p. xxxi.

1832.

In re APPLING.

His Honor the CHIEF JUDGE.—Will you read the order which states before whom the petitioner is directed to attend.

Mr. *Montagu.* The petition being addressed to the Lord Chancellor, the fiat is in the usual form to attend before his Lordship. But a reference to the 2d section of the act, under which this Court is constituted, (1 & 2 *W.* 4, c. 56,) will, perhaps, serve to remove the difficulty. That section enacts that the Court of Review " shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy, as now usually are, or lawfully may be, brought, by petition or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy, or elsewhere." [*His Honor the* CHIEF JUDGE. Read the next clause.] Section 3 directs, that " all such matters to be heard and determined in the said Court of Review shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as hereinafter provided." It has been the practice for the Vice-Chancellor to hear petitions of this kind, as a matter of course, though directed to be heard before the Lord Chancellor.

His Honor the CHIEF JUDGE was inclined to think, that as the attendance of the petitioner had been directed to be before the Lord Chancellor, this Court had not the power to hear the petition, without a special order for that purpose from the Lord Chancellor.

1832.

In re APPLING.

His Honor Sir G. ROSE.—My opinion upon the matter is the same which seems to prevail in the mind of his Honor the Chief Judge, namely, that we cannot interfere. There are, however, three courses open to the parties. 1. They may settle the point, as to a hearing before this Court, by consent; 2. They may go before the Lord Chancellor for his instructions; or 3. They may apply to the proper officer for a new fiat.

His Honor Sir J. CROSS observed, that the Vice-Chancellor's jurisdiction is derivative, and when he hears petitions directed to the Lord Chancellor, it is by the authority of the Lord Chancellor himself.

His Honor the CHIEF JUDGE.—We are not in the same situation as the Vice-Chancellor, for we do not derive our jurisdiction from the delegation of the Lord Chancellor, but from the statute.

Mr. *Montagu* then intimated that there was an opinion in the other Court, that the Lord Chancellor could not direct any petition to be heard before this Court; but he added that he would apply to the Lord Chancellor on the subject.

The Court proceeded further this day in the admission of attornies. *January* 17.

1832. *January* 18.

The COURT directed a new order which it had made, relative to the removal of petitions pending before the Lord Chancellor, and Vice-Chancellor, to be read by the Registrar (*a*).

Mr. *Montagu* begged to ask the Court, whether the motion referred to in that order was to be made with, or without, notice to the other party. He said it had been determined by the Lord Chancellor, that motions might be made before the Vice-Chancellor without notice, for avoiding expense and delay.

His Honor the CHIEF JUDGE.—The motion may be without notice, unless affidavits are used, which are not filed with the Registrar of the Court of Review, in which case alone notice will be requisite.

(*a*) See *ante*, p. xxxi.

Ex parte Sir ANTHONY LECHMERE and others, in the matter of STEWART.

January 18.

Where a party in the country applied to strike a docket and issue a fiat, on 14th Jan. on papers sent from Worcester, the day after the issuing of the orders of the 12th January, which papers used the word "comission" instead of "fiat," and upon the application being refused at the office, the papers were sent back to the country to be altered, and in the mean time another party applied for and struck a docket:—Held, that the first applicant was entitled to the fiat upon his amended papers.

ON Saturday last, the 14th of January, Mr. *Beck*, a solicitor in London, attended at the Bankrupt Office, with the usual documents, for the purpose of striking a docket against *Stewart*, the petitioning creditors being Sir *Anthony Lechmere* and his partners, who were bankers at Worcester. The bond and affidavit, however, having been prepared before the new Bankruptcy Court Act came into operation, the word "commission" was used in them instead of the word "fiat." Upon seeing this, the Secretary of Bankrupts said to

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Mr. *Beck*, as well as to several other solicitors who were similarly circumstanced, that they must amend their documents, and substitute the word "fiat" for the word "commission;" and it was understood at the Bankrupt Office, that Mr. *Beck* should have four days time to procure the necessary alterations to be made. He accordingly sent down to Worcester to have the bond and affidavit rectified, and yesterday, the 17th of January, having received fresh docket papers, went to the Bankrupt Office to strike the docket; but Mr. *Leigh*, a solicitor in London, having the day before struck another docket on behalf of some London creditors, the Secretary of Bankrupts declined to issue the *fiat* upon these new documents, without the authority of the Court.

Mr. *Romilly* now moved that the Secretary of Bankrupts might be directed to prepare and procure the Lord Chancellor's *fiat*, on the docket struck by the first applicant on Saturday last. He contended, that the mistake of the word "commission," instead of the word "fiat," was a mere clerical error; that his clients had used all speed in rectifying it; and that residing in the country at the distance they did, such an error, considering that the orders of the Court were not promulgated until the 12th of January, ought not to give other creditors a priority over them, merely because they were nearer to the seat of justice to take advantage of it.

Mr. *Montagu* opposed the application. The question was, which of two dockets should be preferred; and he apprehended that, both upon the law, and upon

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the facts, it should be decided in favour of his client. There was no difficulty as to the law; for it was a rule clearly established, that the *first regular* docket should be preferred; as was laid down in *Ex parte Stocker*, 1 G. & J. 249, and also in *Ex parte Hardman*, 1 Jac. & W. 294. The principle established by these cases was consistent with the well known rule of law "*Vigilantibus et non dormientibus curat lex.*" There was also another rule in his favour, which was, that when two different persons apply to strike a docket, and one party was prepared to issue the commission, and the other not, that the commission should be issued to the party who was so prepared. This was pursuant to the terms of Lord *Erskine*'s General Order(*a*), which likewise declared, that when two parties were equally prepared to issue a commission, the preference should be determined by lot. Now the facts of the case are, that on Saturday last application was made by the other side that a country *commission* might issue. The docket, therefore, was not for a *fiat*, but for a *commission;* and this error runs through all their docket papers. On Monday, no regular docket papers being in the office, we were ready, he added, to proceed *instanter*. This, it is contended, is a mere clerical error. But granting that to be so, are we to suffer for their clerical error? If a Member of Parliament franks a letter on the 1st of January, mistaking the year, will the Post Office forbear to charge the postage for this clerical error? The rules and orders of this Court, as to striking the docket, were published on the 12th of January, and these were acted upon at Manchester, which was at a greater distance from London than Worcester. But I contend

(*a*) 29 Dec. 1806.

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that this cannot be considered a mere clerical error, for they do not swear on the other side that they did not know the new order. I must, therefore, presume that they knew it; and there was, in fact, time enough for that purpose. But there is another omission, which I have a right to avail myself of. Their affidavit of debt does not state what the consideration for it was. We state in ours, that the consideration is for goods sold and delivered. Now when there is no competition for the docket, though this may be considered no objection; yet when two parties apply together, the one who makes the more regular affidavit ought to be preferred. This doctrine is deducible from the case of *Ex parte Hardman*, 1 Jac. & W. 293, where it was decided, that in issuing a country commission, if one party is not prepared to certify respecting the commissioners, as required by the general order of 25th July, 1817, and the other party is so prepared, the latter is entitled to the commission.

Mr. *Montagu* then read the affidavit of *Ponsonby*, the London creditor. This imputed improper motives to the parties applying for a country commission, and charged them with intending to work it in a collusive manner, and for the purpose of appointing assignees who would favour the bankrupt, to the prejudice of the general creditors. The deponent swore that he and his partner resided in London, and were creditors to the amount of £300 and upwards, and that there were various other London creditors; that the London creditors were far more numerous than those in the country, and that the working of a London commission would be more beneficial to the creditors at large than the working of one at Worcester.

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His Honor the CHIEF JUDGE.—The Court are unanimously of opinion that the petitioner ought to be allowed to strike his docket, and that the fiat should issue to the country creditor. It is not necessary that the affidavit should state the consideration for the debt; nor do the cases cited by Mr. *Montagu* appear to me to bear upon the facts of this case. Those cases contemplate the circumstance of two parties applying together at the Bankrupt Office; but here one party came on the Saturday, and the other on the Monday. It seems to me very doubtful whether the Lord Chancellor might not have issued a *fiat* on the original docket papers, particularly on reference to the 12th and 16th sections of the act, which fit every part of the machinery applicable to a *commission* of bankrupt to a *fiat*. But whether the Chancellor could or could not have done so, as this is the first occasion of such inaccuracy occurring after a change of system in administering the bankrupt law, I think the petitioner ought to be placed in the same situation, as if the Secretary of Bankrupts had allowed his first documents to pass.

His Honor Sir A. PELL.—With respect to the mistake of the word "*commission*," instead of "*fiat*," in the first docket papers, this evidently arises out of the peculiar posture in which bankruptcy proceedings were during the last week. The order of this Court for the alteration in the form of proceeding was not issued till the 12th January, and it was the very next day that the parties in the country sent up these papers. I think it fair to presume, therefore, that the parties in the country, although they do not say so, were ignorant of that order; for if they knew it, there could not possibly

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be any reason for not using the word "*fiat*," instead of the word "*Commission*."

His Honor Sir J. CROSS.—Although the officer of the Court was perfectly right in the caution he used on this occasion, yet I think the Chancellor, if he had been applied to under these circumstances, would have granted a *fiat* upon the original docket papers.

His Honor Sir G. ROSE.—I think, also, that the Secretary of Bankrupts wonld not have exceeded his authority, if he had issued a *fiat* to the first applicant; to whom it was but reasonable, under all the circumstances, that a fair indulgence should be granted.

Mr. *Montagu* then applied for costs out of the estate, which the Court refused.

Ex parte SWAIN.

January 18.

An attorney, unable from bodily infirmity to attend to be sworn in, was allowed to be admitted, on an affidavit sworn before a Master in Chancery.

MR. WRIGHT applied on behalf of an attorney, that the officer of the Court might be permitted to attend him with the roll of the Court, in order to register his admission, on an affidavit of the party that he was unable, through bodily infirmity, to attend personally in Court for the purpose of being admitted and enrolled.

His Honor the CHIEF JUDGE.—The officer of the Court may enter the name of the attorney, on the usual affidavit that he is an attorney of one of the other

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Courts of Westminster Hall, without troubling the officer to attend him with the roll. And as the party cannot attend in Court to make his affidavit, he must be sworn before a Master in Chancery.

Ex parte James Gooden Helsby, in the matter of Thomas Helsby the Elder, James Gooden Helsby, and Thomas Helsby the Younger.

January 18.

The bankrupt, during the forty days allowed for his examination, is, for the benefit of his creditors, privileged from arrest even upon a *capias utlagatum*.

IN this case the petition to the Court of Review stated, that a commission issued on the 8th of November last against the petitioner *James Gooden Helsby*, jointly with the said *Thomas Helsby* the elder and *Thomas Helsby* the younger, under which the petitioner was declared a bankrupt; and that, pursuant to notice in the London Gazette, and the summons of the commissioners, he attended, on the 3d of January instant, at the Clarendon Buildings in South John Street, in Liverpool, and then and there surrendered himself, and duly submitted to be examined before the major part of the commissioners. That the examination of the petitioner continued till about half-past one o'clock, when the commissioners adjourned the same until the 8th of February next, and duly indorsed their protection on the summons. That immediately after the examination of the petitioner was concluded on the 3d of January, and at the moment the petitioner was preparing to leave the room in which the meeting was held, and return to his place of residence in Westmoreland Place, in Liverpool, one *John Ogle*, an officer of the Sheriff of Lancashire, came into the room and inquired which was *John Gooden Helsby*; upon which

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the petitioner said he was that person, when the officer said he had a writ against the petitioner at the suit of *Brogden* and *Garland*. That the petitioner thereupon presented to him the protection of the commissioners, but that the officer said that would not protect him against the writ he then held. That the officer then arrested the petitioner upon a writ of *capias utlagatum*, in a certain action wherein it was stated that the petitioner had been outlawed at the suit of *John Brogden* and *James William Garland*. That *James Spyer* sued out the said writ as the plaintiff's attorney in the action, and came down to Liverpool for the express purpose, as the petitioner believed, of effecting his arrest, and insisted on the petitioner being conveyed to prison, and refused to release him out of custody, although *Spyer*, and *Ogle* the officer, both well knew that the petitioner had been attending before the commissioners for the purpose of passing his last examination, and that he had not then returned home after such examination. The petitioner then submitted to the Court, that *Spyer* and *Ogle* were guilty of a contempt of the authority of the great seal, in such arrest and imprisonment, and that the petitioner was entitled to be protected from arrest during the period aforesaid. That the petitioner was afterwards conveyed to Lancaster Castle, which was at such a distance from the residence of his solicitors, that his signature to the petition could not be attested by them, without considerable expense to the petitioner.

The petitioner therefore prayed, that the signature of his agent in the matter of this petition on his behalf might be deemed sufficient, and that the petitioner might be forthwith discharged out of custody, and that

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the said *James Spyer* and *John Ogle* might be ordered to pay the costs of and incidental to this application, and also all costs occasioned by the arrest and the detention of the petitioner in custody.

January 16. Mr. *Koe*, for the petitioner, had on a former day in this term, on an affidavit of the facts stated in the above petition, obtained an order of the Court, that the signature of the bankrupt to the petition might be dispensed with, and that service of the petition and order on the attorney in London, who had issued the writ, might be deemed good service.

January 18. The petition came on this day for hearing, when it was agreed that the facts stated in the petition, as to the arrest, were correct, and that the cause of action for which the bankrupt had been arrested was an action of debt.

Mr. *Koe* now urged, in support of the prayer of the petition for the bankrupt's discharge, that the bankrupt was protected from arrest, not only by reason of the protection of the commissioners indorsed on his summons, but also by the common law; for he must be considered as a witness summoned to be examined before the commissioners for the benefit of the creditors; and the common law protects a witness against any civil process, even though issued by the crown. This principle is recognized by Lord *Eldon* in *Ex parte Russell* (*a*), which was the case of an extent issued against the bankrupt for a debt due to the crown, and in which Lord *Eldon* held, that though the crown was not bound by the statutes in bankruptcy, the bankrupt

(*a*) 1 Rose, 278.

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was entitled to his discharge, on the spirit of the common law, affecting the crown equally with any other creditor. He admitted there was no case precisely in point with this, but he contended that there was no material difference between an arrest on a *capias utlagatum* and an arrest on an extent, for both were to compel the payment of a debt. And though in cases of felony the bankrupt would not be protected, yet process of outlawry in a civil action could not be considered as criminal process, so as to deprive the bankrupt of the protection allowed him for passing his examination.

Mr. *G. Richards*, contrà, cited *Ex parte Temple* (*a*), where Lord *Eldon* held, that a bankrupt is not by virtue of the commissioners' protection privileged from arrest at the suit of the crown, unless he be in *actual attendance* before them. The point in this case is, whether a *capias utlagatum* can be considered as civil process. The consequence of outlawry is, putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries, and it is also attended with the forfeiture of all his goods and chattels to the king. [*Sir* A. PELL. You are aware that in an action at law the plea of outlawry is merely a plea in abatement.] In equity it is different. The plaintiff in the outlawry has no title to the goods of the party outlawed, until he obtains a grant from the crown; and the crown is not a trustee for the plaintiff, but it is merely out of grace that the king makes such grant; *Anon.* v. *Bromley* (*b*). In *Summervill* v. *Watkins* (*c*) it was held, also, that a party outlawed had no *locus standi in Curiâ*, so

(*a*) 2 Rose, 22. (*b*) 2 P. Wms. 269. (*c*) 14 East, 536.

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as to be relieved from an arrest on a *capias utlagatum*, even though he had become bankrupt, and the plaintiff in the outlawry had proved under the commission and received a dividend on his debt. As to the question of costs, in case the Court decided in favour of the petitioner, he trusted that as no case was cited to show that the arrest was illegal, the Court would not at any rate visit the parties with the penalty of costs, when they were acting in the execution of the process of the law.

Mr. *Koe*, in reply. With respect to the last question as to the costs, the parties complained of knew well that the bankrupt was entitled to his protection, for express notice was given to them that he had just been examined before the commissioners; and he was, in fact, arrested in the very room where he had been examined, and when he was preparing to go home. *Spyers*, also, being an attorney resident in London, went unnecessarily to Liverpool for the express purpose of arresting the bankrupt. The cases cited on the other side related to a claim of property by the outlaw; but this is a case of personal liberty, and the writ on which the bankrupt was arrested is nothing but a civil process issued for the purpose of enforcing a civil demand. [*Sir* A. PELL. If you rely on the 117th section of 6 *Geo.* 4, c. 16, your petition and affidavit should have followed the terms of that section, and have alleged that the bankrupt produced the summons under the hands of the commissioners to the officer who arrested him, and gave the officer a copy thereof.] I rely on the spirit of the common law, and on what Lord *Eldon* says in *Ex parte Russell.*

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His Honor the CHIEF JUDGE.—This being a question of great importance, and one entirely depending upon the principles of the common law,

Cur. adv. vult.

January 19.

His Honor the CHIEF JUDGE.—This case was argued before the Court yesterday, and as there was no express authority on the subject, and the case involved very nice and conflicting principles of law, the Court has taken time to consider of its judgment. The petition prays that a bankrupt, who, while attending before commissioners to pass his examination, was arrested on a writ of *capias utlagatum* in a suit instituted for the recovery of a debt, may be discharged out of custody. Two questions arise on the facts stated in this petition. 1. Whether the protection, afforded by the law to bankrupts and others attending Courts of justice, extends to process of outlawry. 2. Whether the personal disability of an outlaw deprives him of all *locus standi in Curiâ*, for the purpose of claiming his discharge.

The Court is of opinion, that the arrest was irregular, and that the petitioner is entitled to his discharge. The protection to bankrupts attending commissioners for examination is twofold: 1. Under the common law privilege of a witness attending a Court competent to enforce his attendance, which protects him *eundo, morando, et redeundo;* according to the doctrine laid down in *Ex parte Russell* (*a*), where Lord *Eldon* determined that a bankrupt attending the commissioners in obedience to their summons was protected from an arrest on an extent at the suit of the crown,

(*a*) 1 Rose, 278; 19 Ves. 163.

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which is not in general bound by the bankrupt statutes; 2. By the express provision of the Bankrupt Act, 6 *Geo.* 4, c. 16, s. 117, which declares that "the bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender, during the 42 days, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender." The statute then proceeds to give the bankrupt a remedy by action for specific damages, under certain conditions, which upon this motion it is unnecessary to discuss. Now in this case the petitioner was arrested immediately after a part examination by the commissioners, and whilst he was preparing to return home, his further examination having been adjourned till the 8th of February. He was arrested upon a *capias utlagatum*, founded on a judgment of outlawry in a civil suit for the recovery of a *debt*. He therefore stood equally protected by the common law on the one hand, and the provisions of the statute on the other, unless the nature of the process presents an answer to his claim. But it has been urged, that the nature of the process does present such answer; that it is not like the ordinary process, on which debtors are arrested; and that its immediate and avowed purpose is not to compel the defendant to answer the plaintiff in any plea, but is a command to the sheriff by the king to take the defendant, and have his body &c., "to do and receive what our Court before us shall consider of him in this behalf." In fact, however, this process is sued out by the creditor for the same single purpose and object, for which the common *capias* and latitat are sued, viz. to compel the defendant to pay

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the debt for which the action is brought. In *form*, it is criminal process for contempt; in substance, it is civil process to enforce the payment of a debt. Will the *form* of the process then affect the privilege of the bankrupt? *In re M'Williams* (*a*) Lord *Redesdale* lays down the rule, that the thing to be considered is not the form of the process, but the cause of issuing it; and that every mode, by which a creditor can arrest a bankrupt for debt, comes within the meaning of the Bankrupt Act (*b*). That the process resorted to is process of contempt, therefore, signifies nothing; for the principle laid down by Lord *Redesdale* has been confirmed and acted upon in many cases in England, which decide that the process of contempt is considered as civil process for various purposes. Thus in *Ex parte Parker* (*c*), where a bankrupt, on returning from his examination before the commissioners, was arrested on an attachment for contempt, in not paying money pursuant to an award which had been made a rule of Court, Lord *Loughborough* ordered him to be discharged out of custody, upon the ground that the attachment was merely process to enforce the payment of money. So, again, in the *King* v. *Edwards* (*d*), Lord *Tenterden* says, "It has always been held, that attachments for nonpayment of money are in the nature of civil process to enforce the payment of a debt, and that persons in custody, under an attachment for disobedience of an order of Court for payment of money, are in custody for a civil debt, and that the debt is proveable under the commission." The same doctrine was also held by Lord *Eldon* in *Wall* v. *Atkinson* (*e*). Is it then any strain of this

(*a*) 1 Sch. & Lef. 174. (*b*) Irish Statute, 11 & 12 Geo. 3, c. 8, s. 28.
(*c*) 3 Ves. 554. (*d*) 9 B. & C. 652. (*e*) 2 Rose, 196.

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general principle to apply it to a *capias utlagatum*, and to hold that an outlaw in a civil action is in the same condition? In *Hesse* v. *Wood* (*a*) it is said by *Gibbs*, J., that the process of outlawry is now used only as a proceeding in the suit to bring in the party, and that the reversing it is merely the reversing of an interlocutory judgment. There is a great distinction between outlawry in civil, and in criminal, cases. In the former it is treated as mere civil process; in the latter it is strictly criminal, and therefore may be taken out against peers, which in the former case it cannot. 1 *Hale, P.C.* 199. An outlaw, also, under civil process may be a witness, and should therefore be entitled to the protection of a witness; but an outlaw under criminal process cannot be a witness. Looking therefore at the *capias utlagatum* in this case as merely civil process to enforce the payment of a debt, I am of opinion, and such is the opinion of the whole Court, that the arrest of the petitioner while in attendance on the commissioners was illegal.

I come now to the second question,—has the petitioner any *locus standi in judicio*, to entitle him to claim the protection of the Court and his discharge from custody? When process of outlawry was extended to actions for debt, many of the legal disabilities attendant upon outlawry in criminal prosecutions followed; and amongst others, the outlaw was held incapable of suing in any Court, except to reverse his own outlawry. *Griffith* v. *Middleton* (*b*), *Jason* v. *Kite* (*c*). According to *Britton*, *Respondra a touts, mes nul respondra a luy*. And, upon this principle, a man outlawed in an action for a debt would be incompetent to claim in a Court of jus-

(*a*) 4 Taunt. 694. (*b*) Cro. Jac. 425. (*c*) Sid. 43.

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tice any civil right, in which he alone was interested, or a release from any personal responsibility to others, until he had obtained a *locus standi in judicio*, by appearing to reverse the outlawry. Upon this principle, the case cited at the bar of *Summervil* v. *Watkins* (*a*), and also the case before mentioned of *Griffith* v. *Middleton*, were decided. So, in like manner, it was held in the Common Pleas, in the case of *Loakes* v. *Holbeach* (*b*), that a party, who had been outlawed in the Court of King's Bench in an action to recover the arrears of an annuity, could not be heard in the Common Pleas on a motion to set aside the annuity, on the ground that where the object of the outlaw was *ad lucrandum*, there ought to be ability in the person, and that as the application made by the defendant was to gain by way of discharge from the annuity, which is the same as to gain by way of *perquisition*, that is, by suit in an action, the party could have no *locus standi in judicio*. But in all these cases, the advantage sought by the outlaw was a pecuniary gain or discharge, in which none but himself was interested, the denial of which involved no public inconvenience, and compromised no public policy. But the case before the Court stands on very different grounds. The protection afforded to witnesses and bankrupts is not given for their personal advantage; but, in the case of witnesses, it is for the benefit of the suitors, and the advancement of public justice, and is indeed the privilege of the Court, and not that of the witness. This appears from what Lord C. J. *De Grey* says in *Cameron* v. *Lightfoot* (*c*), which is cited by *Gibbs*, C. J. in *Nixon* v.

(*a*) 14 East, 536. And see also the case of *Beauchamp* v. *Tomkins*, 3 Taunt. 141.

(*b*) 4 Bing. 419.

(*c*) 2 W. Bl. 1190.

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Burt (*a*). In the case of a bankrupt, his protection is for the benefit of the creditors at large; and it is contrary to the whole policy of the bankrupt laws, that one creditor should avail himself of the bankrupt's attendance before the commissioners, for the purpose of enforcing his own individual claim, to the common detriment of the rest of the creditors.

Looking therefore at this petition, as an application for the benefit of the creditors at large, and not merely for the personal advantage of the bankrupt,—considering also his protection as the privilege of the Court and of the creditors, in the same way that the privilege of an attorney is regarded as the privilege of his client, and the privilege of a member of parliament as the privilege of his constituents and of the public,—the Court is of opinion, that the petitioner ought to be discharged out of custody, and that the petitioner's costs of the arrest, and other incidental expenses should be paid out of the estate; but that so much of the prayer of the petition, as asks for costs against the solicitor and sheriff's officer, should be dismissed.

His Honor Sir A. Pell.—This is a case of considerable difficulty, and I own I have had much doubt upon it in my own mind. Upon the whole, however, I incline to concur with his Honor the Chief Justice in the opinion which he has delivered, more especially as this is an application in favour of the liberty of the subject; and every intendment should, therefore, be made against a *capias utlagatum* in a civil suit—a process which is now considered little more than a private execution. My difficulty in this case has arisen from the strong terms in

(*a*) 7 Taunt. 689.

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which the law, with reference to outlawry, is laid down in many decided cases, as well as in all the text books. In *Co. Lit.* 128 it appears, that a person outlawed cannot regularly maintain an action; for by his contumacy he is out of the king's protection, and he shall have no privilege or benefit from that law, of which he is himself a violator, and to which he refuses to be amenable. And in the case of *Loukes* v. *Holbeach* (*a*), the Court of Common Pleas held, that an outlaw in a civil suit cannot be heard in Court to make a motion for his own benefit. In the case now before the Court, the application is by the bankrupt, being an outlaw, and it is made by his counsel for his benefit. There can be no doubt, that if the outlawry had been founded on criminal process, this application must have been refused. My first impression was, that the petition in this matter had been framed entirely on the 117th section of the 6 *Geo.* 4, c. 16; and had that been the case, as the petitioner has not complied with the conditions of that section, the petition could not have been sustained; unless, indeed, that part of the clause imposing those conditions could, as perhaps it might, be considered as merely with a view to the benefit of the party arrested, by enabling him to recover the penalties therein mentioned (*b*). The case of *Loukes* v. *Holbeach* (*a*) certainly

(*a*) 4 Bing. 419.

(*b*) The words of the 117th section are—"That the bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender, during the said forty-two days, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender; and if such bankrupt shall be arrested for debt, or on any escape warrant, in coming to surrender, or shall after his surrender be so arrested within the time aforesaid, he shall, on producing the summons under the hands of the Commissioners to the officer who shall arrest him, and giving such officer a copy thereof, be immediately

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appears, at first sight, to be very strong against this application; but there the party was suing for his own benefit, which an outlaw has clearly no power to do. In this case, however, the bankrupt stands in a different posture. The protection afforded him is for the benefit of his creditors, and not for himself alone. If he is arrested, therefore, while attending for their benefit, it is fit they should not be prejudiced by his detention. A great distinction arises where a party claims a personal advantage for himself, and where the application is for the benefit of others. The case of *Groves* v. *De Castro* (*a*) sufficiently proves, that a *capias utlagatum* in a civil suit is to be considered only as a private execution. Process of outlawry also in a civil suit does not prevent a man from being a witness, for his contumacy ought not to deprive others of their interest in his testimony. So in *Co. Lit.* 8 *a* it is laid down, that persons outlawed in debt, trespass, or the like, may be heirs. And in *Co. Lit.* 128 *a* it is said, that the disability of outlawry in the plaintiff is only pleadable where he sues in his own right, and not where he sues in *auter droit*. The same point is determined also in *Killigrew* v. *Killigrew*, 1 Vern. 184. According to the case of *Loukes* v. *Holbeach* (*b*), an outlaw may be relator for the benefit of

discharged; and if any such officer shall detain any such bankrupt after he shall have shown such summons to him as aforesaid, such officer shall forfeit to such bankrupt, for his own use, the sum of £5 for every day he shall detain such bankrupt, to be recovered by action of debt in any Court of Record at Westminster, in the name of such bankrupt, with full costs of suit." It would seem, therefore, that the production of the summons to the officer, and giving the officer a copy, are essential preliminaries only to an *action* against the officer for damages, and ought not to affect the right of the bankrupt to apply to the Court for his discharge from the imprisonment, under the first part of the above enactment.

(*a*) Bunb. 194. (*b*) 4 Bing. 422.

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the crown, or a charity; and he may also prosecute an information for the king, though not if it is to procure any benefit for himself. One difficulty has struck my mind, which I do not know well how to reconcile, and it is this,—that though an outlaw in a civil suit may be examined as a witness, he is prevented from acting as a juror (*a*). I have before observed, that this is a case of considerable doubt; but when we contrast the personal liberty of the subject on the one hand, and the doubt as to the application of a severe law on the other, I think the latter should certainly give way, and I therefore agree that the petitioner ought to be discharged.

His Honor Sir J. CROSS.—As the Chief Justice has delivered the unanimous judgment of the Court, I have only to say, that I entirely agree in the opinion he has expressed.

His Honor Sir G. ROSE. also concurred.

Mr. *Koe* then urged,—in regard to the question of costs—that the Court had decided that the petitioner had been wrongfully arrested, and was entitled to be discharged, and yet had ordered him to pay the costs himself; for such might be the effect of the order, as it was possible that his estate might yield a surplus. He submitted, that the officer who arrested him, and the solicitor who directed the arrest, should pay the costs; or, at any rate, that the matter should stand over, without prejudice, till they could be heard.

(*a*) The reason why an outlaw is deemed incapable of serving on a jury, with great deference to the learned Judge, appears to be sufficiently obvious. A man must be possessed of certain *property* in order to qualify him as a juror; but an *outlaw* can have no property whatever, until his outlawry is reversed.

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Ex parte Helsby.

His Honor the Chief Judge.—We have relieved the officer from the liability of costs without hearing him, and have thrown the charge of them on the estate, as it was for the benefit of the assignees and creditors that the petitioner was in attendance. We consider this application as if made by them, for if it were for the benefit of the party himself, he would have no *locus standi in Curiâ*.

Order made accordingly for the discharge of the petitioner, and that the costs (*a*) of the petition should be paid out of the estate, the bankrupt undertaking to bring no action.

(*a*) With respect to the question of costs, it was held by Lord *Eldon*, in *Ex parte Woods*, 1 Rose, 46, 18 Ves. 1, which was a similar case of a sheriff's officer arresting a bankrupt during his protection, that the costs must be paid by the officer. "In every case of privilege," his Lordship says, "and more particularly in that of a bankrupt, parties guilty of a violation of it must abide by the consequences: the bankrupt must, at the costs of the officer, be put in the situation he was in before the arrest."

Coram Lord Chancellor.

Ex parte Lowe, in the matter of Aaron.

Westminster Hall.

January 20.

The Lord Chancellor has no jurisdiction to hear an original petition in bankruptcy since the 1 & 2 *W.* 4. c. 56.

A PETITION for a supersedeas had been heard before the Vice-Chancellor, and dismissed upon a preliminary objection. A petition of appeal was then presented to the Lord Chancellor, praying him to rehear the matter, and that the order of the Vice-Chancellor might be discharged; which last petition had been answered in the usual way by the Lord Chancellor, before whom the parties were directed to attend on the next day of petitions, which was on the 10th January, 1832, the day previous to that in which

1832.

Ex parte Lowe.

the new Bankruptcy Court Act came into operation. Before the petition of appeal could be brought on for hearing, the new Judges of the Court of Bankruptcy had begun to exercise their functions; and the parties being desirous to know whether they were to hear this petition before his Lordship, or the new Judges,

Mr. *Twiss* accordingly requested to have his Lordship's directions as to the tribunal before which the matter was to be brought on.

Lord Brougham, C.—I have no doubt whatever upon the question. The authority of the new Judges is exclusive. I have no control or authority whatever over them, except what the act of parliament gives me, namely, to hear appeals from their decisions in the precise manner pointed out by the act. I have come to this conclusion, not without due deliberation, nor without competent advice. The new Judges have the authority out and out, and I have good reason to believe it was intended by the legislature that they should have that authority. It is therefore clear, in my opinion, that the petition alluded to must be removed to the Court of Review, and heard by the Judges there. I shall make, however, no order upon the subject. All that I state decisively is, that I have no jurisdiction in the matter now submitted to me. The parties, therefore, must look into the act of parliament, and be guided by its provisions (*a*).

(*a*) The same point as to the jurisdiction was shortly after this decision argued more fully before the Lord Chancellor and the Vice-Chancellor, by the Solicitor General, Sir *Edward Sugden*, and Mr. *Montagu*, in *Ex parte Langston, re Gardner, Ex parte Benson, re Dilworth*, and *Ex parte Ward, re Austin*, in Lincoln's Inn Hall, on February 18th, 1832, when an order was made directly the reverse of the opinion above expressed.

1832.

January 21.

Costs of application of mortgagee to bid at the sale, ordered to be paid out of the proceeds.

Ex parte SAY, in the matter of THORNTON.

THIS was a petition by a mortgagee of premises mortgaged by the bankrupt, and which had been ordered to be sold, praying for leave to bid at the sale, and that the costs of the application might be ordered to be paid out of the proceeds of such sale.

Mr. *Wood* appeared in support of the petition, and cited the case of *Ex parte Marsh*, 1 Madd. 148, in support of the application. He admitted, however, that in *Ex parte Robinson*, Mont. & M. 261, the application for costs was refused (*a*).

Mr. *Patteson* appeared for the assignees to consent that the mortgagee might bid at the sale; and as he did not oppose the application for costs,

The Court, after some hesitation as to the costs, granted the order as prayed, observing, that it was evidently for the interest of the bankrupt's estate that there should be as many bidders as possible. The Court desired also it might be understood, that in all cases coming before them the Judges would endeavour to adhere to the present practice in bankruptcy.

(*a*) See also *Ex parte Hammond*, Buck, 464.

January 23.

Where an assignee is removed, and another appointed, there is no need of any assignment under the 1 & 2 W. 4, c. 56.

Ex parte FALAR, in the matter of ANDREWS.

THIS was a petition of the petitioning creditor for the removal of one of the assignees under the commission, on the ground of his having absconded and become

1832.

Ex parte FALAR.

insolvent. It stated that he had left his residence in Catherine Street in the Strand, without paying rent or taxes, and that he had ceased to occupy the premises since April, 1830; that he had never been heard of since, but it was believed he was in Ireland. The petition therefore prayed, that the creditors might proceed to elect another assignee in his stead.

Mr. *Jacob*, in support of the petition, observed that the only difficulty was, as to whether it was necessary to vacate the old assignment, and execute a new assignment to the remaining assignee and the one to be so chosen; or whether the new act of 1 & 2 W. 4, c. 56, s. 25 rendered such a proceeding unnecessary (*a*), and vested the estate in the new assignee, without any fresh assignment.

The Court were of opinion, that there was no necessity for any fresh assignment, and that the intention of the act was to save the expense of an assignment in all cases. The order was made accordingly for the choice of a new assignee, and for the payment of the costs of the application out of the estate.

(*a*) The words of the 25th section are, "When any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them: and as often as any such assignee shall die, or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee, shall by virtue of such appointment vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose."

1832.

January 23.

Mortgagee's costs to be paid out of the proceeds of the sale.

Ex parte BROWN, in the matter of CLARK.

THIS was a petition by a legal mortgagee for a sale of the estate, and for leave to bid at such sale, and that the costs might be paid out of the proceeds.

Mr. *Montagu,* in support of the petition.

Mr. *Reynolds,* for the assignees, consented to the order for sale and leave to bid, on the terms of the assignees having the conduct of the sale, but stated that he was not authorized to consent to the payment of the costs.

The Court, however, thought that the costs ought to be paid out of the proceeds of the sale; *Rose,* J. observing, that that was perfectly fair, and was the usual mode of proceeding (*a*). The order was made, therefore, according to the prayer of the petition, the assignees to have the conduct and management of the sale.

(*a*) But see *Ex parte Atkinson,* Mont. & M. 261; *Ex parte Hammond,* Buck, 464.

January 23.

Under special circumstances time enlarged for opening a commission; and a petition was answered for the same day, on which the order was applied for.

Ex parte MOODY.

A JOINT commission against two partners had been issued on the 10th instant, the day before the commencement of the jurisdiction of the new Court of Bankruptcy. On the 21st January the petitioning creditors were prepared to prove, before one of the commissioners under the new act, a positive act of bankruptcy against one of the alleged bankrupts; but on account of the absence of a witness at Tonbridge, in

1832.

Ex parte Moody.

Kent, the petitioning creditors were not prepared to prove an act of bankruptcy against the other partner. Under these circumstances, the commissioner would not permit them to go into the evidence they had ready, as to an act of bankruptcy by one of the partners. They now therefore petitioned the Court, as their time expired to-morrow, that the time for opening the commission might be enlarged for a week, in order that they might procure the attendance of the witness to prove the act of bankruptcy against the other partner.

Mr. *Montagu*, in support of the petition, stated that it would save considerable expense if the time was enlarged; and as the petition was not yet answered by the Court, he also prayed that it might be answered for to day.

The Court granted the order as prayed; but desired it might be understood that it was not a matter of course, and that such applications would not in general be countenanced, as the petitioning creditor ought always to be prepared to open the commission at the proper time.

In the matter of Matthews.

January 23.

When time expired for opening a commission, through the contrivance of the bankrupt; petitioning creditor obtained leave to strike a new docket.

In a case of emergency, a petition will be answered *instanter*.

Mr. *Montagu* applied on behalf of the petitioning creditors, Messrs. *Ackerman* & Co., for leave to strike a docket, and that a *fiat* might issue, under the following circumstances. In November last the petitioning creditors proceeded to open a commission, but the bankrupt was successful in keeping a servant out of the way, who could have proved the act of bankruptcy, till

1832.

In re MATTHEWS.

the time was expired within which the commission ought to have been opened. The bankrupt, however, had been subsequently arrested, and had remained more than 21 days in prison, so that there was now proof of a complete act of bankruptcy. But as the rule was, that the same petitioning creditor could not strike a fresh docket, after neglecting to proceed under the first, without leave of the Court, he now applied for an order for that purpose, and that a *fiat* might issue thereupon.

The same application was also made in this case as in the last, that the petition be answered *instanter;* Mr. *Montagu* observing, that in cases of emergency it was not unusual for the Lord Chancellor to answer the petition at the same time that he made the order.

His Honor the CHIEF JUDGE.—You may take the order, but without prejudice to the rights of any other parties.

EX parte DONALDSON, in the matter of WRIGHT.

January 23.

A party using affidavits already filed in support of a petition to the Lord Chancellor, which is transferred to this Court, must give notice to the other party.

MR. *Bichner* moved, that the petition pending before the Lord Chancellor in this matter might be transferred and set down for hearing before the Court of Review; and that the affidavit and certificate of unclaimed dividends, which had been filed with the Secretary of Bankrupts, might be read on the hearing of the petition.

His Honor the CHIEF JUDGE.—When the matter is brought on, if you mean to use affidavits filed in support of the petition to the Lord Chancellor, you must give notice to the other side of your intention to do so.

1832.

January 24.

Ex parte Rose, in the matter of Rose.

An order to enlarge the time for the bankrupt's surrender is of course, if applied for six clear days before the day appointed for his surrender.

THIS was a petition of the bankrupt, praying that the time for his surrender might be enlarged. It appeared, that two petitions had previously been presented to the Lord Chancellor by a creditor, for the purpose of superseding the commission, and that an order had been obtained on each petition; but both orders had been abandoned, as the bankrupt had never surrendered.

Mr. *Cooper*, in support of the petition, said that the application was made under the 6 *Geo.* 4, c. 16, s. 113, and was a matter of course before the late Bankruptcy Court Act; but he apprehended it was now necessary that the matter should be mentioned to the Court.

His Honor Sir G. Rose.—If there are six clear days between this application and the time appointed for the bankrupt's surrender, the petition is still of course.

Mr. *Cooper* stated the fact to be so; upon which

The Court granted the petition.

Ex parte Joseph Osborne.

Same day.

Order for *supersedeas* under the composition contract.

THIS was a petition of the bankrupt to supersede his commission, under the 133d section of the Bankrupt Act, on the ground that nine-tenths in number and value of his creditors had agreed to accept a composition upon the amount of their debts, and had consented to the commission being superseded. The com-

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Ex parte Osborne.

missioners having duly certified to that effect, pursuant to the terms of Lord *Eldon*'s general order, and the assignees consenting to the petition,

The Court made the order as prayed.

Mr. *Montagu* for the petitioner.
Mr. *Burke* for the assignees.

Ex parte Rodgers, in the matter of Parkin the Elder and Parkin the Younger.

January 24.

An equitable mortgagee of one partner, for a debt due from the other, may prove his whole debt against the separate estate of that other partner, and retain his security against the first.

Where a petition to prove is unnecessary, the petitioner is liable to costs.

In this case a joint commission had issued against the above bankrupts, and the petition was filed by an equitable mortgagee, praying a sale of certain leasehold premises on which he had a claim, and for leave to prove the deficiency under the commission.

Mr. *Rogers* appeared in support of the petition.

Mr. *Turner*, for the assignees, stated the facts to be, that *Parkin* the younger having borrowed a sum of money of the petitioner, *Parkin* the elder gave the petitioner an equitable lien on the estate in question, which was the sole property of *Parkin* the elder. Under these circumstances he was instructed to consent to the sale, provided the deficiency was proved against the separate estate of *Parkin* the younger.

The Court intimated, that if the debt was the debt of *Parkin* the younger, the petitioner might prove his whole debt against the separate estate of *Parkin* the younger, and still retain his security.

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Ex parte Rodgers.

Mr. *Rogers* was then desirous of abandoning that part of the prayer of the petition, which related to the proof of the deficiency; upon which

Mr. *Turner* insisted, that if that part of the petition was abandoned, he was entitled to costs, inasmuch as the sale was only necessary in order to raise a fund for the payment of the debt; and if there was no deficiency, the petition for proof was useless.

The Court acquiescing in this proposition, the order was taken for the sale, as prayed, the petitioner proving the deficiency against the separate estate of *Parkin* the younger.

Ex parte White, in the matter of Scrivenor.

January 24.

Whatever ground there may be for the discharge of a party, who is arrested on an attachment for not paying costs pursuant to an order—previous notice of the application must be given to the other side.

IN this case a petition had been presented by *White*, to supersede the commission against the above bankrupt, on account of a defect in the petitioning creditor's debt. Pending that petition, another petition was presented to substitute a new good debt for the bad old one. The original petition to supersede came on for hearing before the Vice-Chancellor, and was dismissed with costs; and an order was made for the substitution of a new debt, which was confirmed, on appeal, by the Lord Chancellor. No proceeding, however, was ever taken under the order for substitution; so that, notwithstanding these orders, the commission was in reality good for nothing, as the substituted debt had never supplied the place of the original bad one. A petition was then presented to the Lord Chancellor, praying that the order made for the substitution of the

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Ex parte WHITE.

new debt, and the confirmation of that order, might be rescinded, and that the commission might, on the ground of the original application, be superseded. It was so ordered, and the commission being thus superseded, every thing respecting it became a nullity. Before the supersedeas issued, however, the party concerned had obtained the Master's allocatur on the order for the costs on the original petition; but after the commission was superseded, and after notice of it was given to the other party, he arrested *White* on an attachment for the amount of the costs.

Mr. *Montagu* now applied to the Court by motion for the discharge of *White* from custody, contending that the commission having been superseded, every proceeding under it fell also to the ground, and therefore that the order for costs on the original petition became a perfect nullity. He stated that the party at whose suit, so to speak, the petitioner was arrested, was willing to consent to his discharge; but the attorney, who claimed a lien for his costs, refused to interfere in the matter, and the Warden of the Fleet would not discharge the prisoner, without the consent of the attorney, or the order of this Court. To bring this matter on by way of petition would occasion considerable expense, as it would be necessary to set out all the previous proceedings, which were very voluminous; and he therefore trusted that the Court would allow him to apply by motion for the discharge of *White* from custody, grounded of course on proper affidavits of the facts, which he was then prepared with, if the Court thought proper to entertain the application. His motion would be, that *White* should be discharged out of

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Ex parte WHITE.

the custody of the Warden of the Fleet; for the question was, whether he was not entitled to an absolute discharge: but if the Court should decline to make that order, then that he be discharged out of custody, upon paying into Court the sum of £69. 17*s.* 4*d.*, (that being the amount of the costs for which the party had been arrested,) to abide the future order of the Court. [*His Honor the Chief Judge.* Have you given notice of this motion to the attorney claiming the lien?] We have made a communication to him, and he said, you may do whatever you can. But I contend, that the attorney has no more right to have formal notice of this application than any gentleman in this Court, the only order actually signed having been rescinded.

The Court, however, after some deliberation, thought that it was incumbent on the applicant to give notice to the attorney on the other side, who was the only party interested in opposing the motion. They directed, therefore, notice to be given for the following day, when the matter might be mentioned again; and if the Court could take cognizance of it on motion, and the facts were not disputed, the party might be discharged (*a*).

(*a*) The matter was subsequently arranged between the parties, as to the attorney's claim for costs, and an order was made for the discharge of the party from custody.

Ex parte GRIFFITH, in the matter of COOPER.

January 25.

A petition to tax a solicitor's bill must be served on the opposite party.

THIS was a petition to tax a solicitor's bill of costs in bankruptcy, and to stay an action which had been

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Ex parte Griffith.

brought for the recovery of the same. The Court inquired whether the petition had been served on the opposite party.

Mr. *Montagu*, for the petitioner, said that the petition had not been served, but he contended that as in equity such a petition was always taken to be as of course, so it ought to be in bankruptcy; but

The Court thought that the rule in bankruptcy was, that the opposite party must always be served with a petition for such an object; the Chief Justice adding, that it was the intention of the Court to adhere to the former practice in bankruptcy. The petition, therefore, was ordered to stand over for that purpose.

January 25.

Where a petitioner's affidavits were only filed the day before the petition was appointed to be heard, the Court ordered it to stand over, that the respondent might answer the affidavits.

Ex parte Billings, in the matter of Lucas and Shore.

On this petition being called on, Mr. *Jacob* applied that it might stand over, in order that the respondent might answer the affidavits filed in support of the petition. He admitted that it was not the rule formerly to allow, in general cases, petitions to stand over for this purpose; but that rule originated, in two days only being allowed between the time of answering a petition, and the time of setting it down for hearing. Now, however, as there were eight days allowed for this purpose, and as the affidavits in this case had been filed only yesterday after two o'clock, which was the last day but one before the expiration of the eight days, and merely the day before the petition was set down to be heard, he contended that the proceeding was vexatious, there

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Ex parte Billings.

not being sufficient time to obtain copies before the hearing.

The Court, under these circumstances, directed the petition to stand over, but declined ordering the petitioner to pay the costs of the day.

Ex parte Lowe, in the matter of Aaron.

January 25.

Notice must be given to the other side of an application to discharge an order.

MR. *TWISS* had obtained, yesterday, an order to transfer for hearing before this Court a petition of appeal standing in the Lord Chancellor's paper.

Mr. *Jacob* now applied *ex parte* to discharge that order, as he had no doubt that the other side, if dissatisfied with the decision of this Court, would again appeal to the Lord Chancellor, by which means the costs would be considerably increased.

Per Curiam.—You may take an order in the form of a rule, to show cause why the order should not be discharged; but we cannot make an absolute order without notice being given to the other side.

Ex parte HENRY MOULT, THOMAS HENRY JONAS HOBSON MARSHALL, ALEXANDER WILDE THORNEBY, WILLIAM WRIGHT, and JOSEPH ATKINSON, in the matter of THOMAS BARROW and GEORGE GEDDES.

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January 27.

B. & G. carry on business at *Manchester* as commission agents under the firm of *B. & Co., G.* being also a trader on his own separate account at *Stockport*, under the firm of *G. & Co.*, and being likewise a partner with *J.* in *London* trading under the firm of *J. & Co.*, and with *S. R.* at *Stockport*, trading under the firm of *S. R. B. & Co.* drew two bills upon *J. & Co.* payable to the order of *B. & Co.* which *J. & Co.* accept, and which are afterwards indorsed by *B. & Co., G. & Co.*, and *S. R.*; and of which *W. & Co.* became the holders for a valuable consideration, without any knowledge that *G.* was a partner in the house of *B. & Co.*, or in that of *J. & Co. B. & G.* and *J.* severally became bankrupt: the Judges were equally divided on the question whether *W. & Co.* could prove the amount of the bills both against the joint estate of *B. & G.* and the separate estate of *G.*, or whether they must elect:—But held, *per tot. Cur.*, that the amount of dividends which had been previously *declared*, though not received by *W. & Co.*, under the commission against *J.*, must be deducted from such proof.

THE petitioners in this case were the assignees of the above-named bankrupts. The facts stated in the petition, which were not contradicted on the other side, were as follows:—A commission issued against the bankrupts on the 17th December, 1828, under which they were duly declared bankrupts; they having carried on the business of commission agents at Manchester, in copartnership, under the firm of *Thomas Barrow and Co. Geddes*, one of the bankrupts, also carried on the business of a cotton manufacturer at Stockport, in the county of Chester, on his own separate account, under the firm of *Geddes and Co.*; and he was also a partner with *Thomas Johnston*, of Cheapside, London, in the business of a warehouseman, which was carried on under the firm of *Thomas Johnston and Co.*; and a partner likewise with *Samuel Radcliffe* of Stockport, in the business of cotton spinners, which was carried on under the firm of *Samuel Radcliffe*.

A commission of bankrupt issued against *Thomas Johnston* on the 29th October, 1828, under which he was duly declared a bankrupt.

On the 25th of March, 1830, *Robert Williams, John Deacon, John Labouchere, Henry Jykes Thornton, Montague Williams*, and the Honorable *John Thornton Leslie Melville*, of Birchin Lane, London,

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Ex parte Moult and others.

bankers and copartners, were permitted, under the commission against *Barrow and Geddes*, to prove against their joint estate a debt of 641*l.* 9*s.*, as due to them upon two several bills of exchange,—one of which was for the sum of 258*l.* 16*s.*, dated at Manchester, the 8th July, 1828, and payable three months after date; and the other bill for 382*l.* 13*s.*, dated Manchester, the 1st August, 1828, and payable three months after date; both which bills were indorsed to Messrs. *Williams, Deacon and Co.*, for a full and valuable consideration in money paid by them.

These two bills were drawn by the bankrupts under the firm of *Thomas Barrow and Co.* upon and accepted by *Johnston and Geddes*, under their firm of *Thomas Johnston and Co.*, payable to the order of *Thomas Barrow and Co.*, and were indorsed by the bankrupts under the firm of *Thomas Barrow and Co.*, and were also indorsed by *Geddes*, one of the bankrupts, in his separate firm of *George Geddes and Co.*, as well as by the said *Samuel Radcliffe*. These bills, with other similar bills, were so accepted by the firm of *Thomas Johnston and Co.*, to a much greater amount than they had received value for; and the amount of the two bills in question was on the 18th November, 1828, proved by *Williams and Co.* under the commission against *Johnston;* under which, two dividends, one of *2s.* 6*d.* in the pound, and the other of *2d.* in the pound, amounting to *2s.* 8*d.* in the pound, had been declared; and which dividends might have been received by *Williams and Co.*

On the 25th of March, 1830, *Williams and Co.* were also permitted, under the commission against *Barrow and Geddes*, to prove against the separate

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estate of *Geddes* the sum of 555*l.* 18*s.* 4*d.*, being the balance of the two bills, after deducting the amount of the dividends declared under the commission against *Johnston;* which dividends, however, had not been received by *Williams and Co.*

It appeared that, until the bankruptcy of *Barrow and Geddes, Williams and Co.* did not know that *Geddes* was a partner in the firm of *Thomas Barrow and Co.*, or in that of *Thomas Johnston and Co.*, but considered that those firms, and also the firm of *Geddes and Co.*, were composed of different and distinct persons. The petitioners contended, that *Williams and Co.* ought not to have proved the said sum of 641*l.* 9*s.* against the joint estate of *Barrow and Geddes,* and also the sum of 555*l.* 18*s.* 4*d.* against the separate estate of *Geddes;* but that they ought to have been put to their election, against which of the said estates they would prove, and that one of such proofs ought to be expunged. No dividend had been declared, either of the joint estate of *Barrow and Geddes,* or of the separate estate of *Geddes,* but dividends under both those estates were about to be declared.

The petition prayed, that *Williams and Co.* might be ordered to elect, whether they would remain creditors under their said proof against the joint estate of *Barrow and Geddes,* or under their said proof against the separate estate of *Geddes,* and that upon their electing to remain creditors upon one of those estates, their proof upon the other might be expunged. And in case they should elect to remain creditors upon the estate of *Barrow and Geddes,* then that the amount of their proof upon that estate might be reduced by the sum of 85*l.* 10*s.* 8*d.*, being the amount of the

dividends declared under the commission against *Thomas Johnston*, upon their proof made under his commission. And in case they should refuse to make such election, then that both the said proofs might be expunged.

Mr. *Wigram*, in support of the petition, admitted that the rule of election, as to proof against the joint or separate estate of parties who were bankrupt, was not approved of in general by the several judges before whom this question had arisen, though they had all felt themselves bound by it. It certainly did appear unreasonable, that a party holding such a bill of exchange, as in the case before the Court, was at law permitted to avail himself of his joint and separate security, by bringing an action against all the parties to it, whether drawer, acceptor, or indorsers,—and yet, because a commission of bankruptcy intervenes, that he should be wholly deprived of that right, and be prevented from proving the amount of the bill against all the estates of the several parties to it. Perhaps the origin of the rule might be, that in bankruptcy the Court, in administering the funds, always severs the joint from the separate estate, devoting the joint estate to joint creditors, and the separate estate to the separate creditors; holding, therefore, that a party proving against the joint estate shall not be entitled on the same security to swallow up the separate estate, and so deprive the separate creditors of their only chance of recovering their debts. Some cases, however, may be relied on by the other side, in which double proof has been allowed. For instance, where there was a bill drawn by a firm of *A. and Co.*, which consisted of *A.*

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B. C. and D., and the bill was accepted by a firm of *D. and Co.*, which was composed of *A. C. and D.*, and the holder of the bill was ignorant that *A. C. and D.* the acceptors were also part of the firm of the drawers,—in this case the Court has said, there shall be double proof, and that the holder might prove as well against the joint estate of *A. B. C. and D.*, as against the separate estate of *A. C. and D.* The second question raised by the petition was, whether the creditor, after being allowed to prove against one estate, ought not to deduct the amount of the dividend *declared* upon that estate, before he can prove under the commission against the joint estate. As to this point, the law was so decisive in favour of the deduction, that he would not take up the time of the Court by any argument upon it.

Mr. *Montagu*, for the respondents, contended that the bill holders in this case were entitled to double proof. It appeared, that there were no less than four different firms, all trading under different names, and at different places. To the present case may be applied the observations made by Lord *Eldon* in *Ex parte Sillitoe*, 1 Glyn. & J. 383, where he says, "I well remember the case of *Shakeshaft, Stirrup*, and *Salisbury* (*a*). There were four or five persons in a partnership; some of them carried on business in Liverpool, some in other places, and the credulous world took it for granted they were different concerns, though they were, in fact, so many wheels of one machine." Now in this case, *Barrow and Geddes* carried on business at Manchester, under the firm of *Thomas Barrow and Co.* They are the drawers of the

(*a*) Cited in *Curtis* v. *Perry*, 6 Ves. 743, 747; and *Ex parte St. Barbe*, 11 Ves. 414; and see 1 Mont. 2.

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bills. *T. Johnston and Co.* of *London*, are the acceptors, of which firm *Geddes* is also a partner. *G. Geddes and Co.*, of *Stockport*, are the indorsers, *Geddes* being likewise the sole individual trading under that firm. *Samuel Radcliffe* of *Stockport*, is another indorser, *Geddes* being likewise a partner with him. The question therefore is, whether the creditors *Williams and Co.*, are entitled to prove the bills, of which they are the holders, as well against the estate of the drawers, as against the estates of the acceptors and indorsers. With respect to the law, there is certainly much perplexity, both as regards the right to put a creditor to his election, and the right of double proof. It was an observation of Lord *Thurlow*, that he never could understand why if a creditor has been vigilant, in taking a joint and separate security, he should not have the benefit of his vigilance; and that it was merely an arbitrary rule in bankruptcy, adopted for the sake of convenience, that deprived him of this right. The justice of the rule, indeed, has been greatly doubted by Lord *Eldon*, as well as by Lord *Thurlow*, and there was every reason for entertaining such doubt. The Court would therefore not extend a rule so doubtful in its nature to any case, where it did not strictly apply; nor will any Court extend it to a case, where the creditor's eyes are closed. Where indeed the creditor's eyes are open,—as, if a party cognizant that *A.* is one of the firm of *A.* and *B.*, takes a bill drawn by *A.* upon the firm of *A. and B.*,—there he is not entitled to double proof. So, where there are no distinct houses, although the creditor be ignorant of such fact, the Court has said, that the creditor has no right to double proof; unless, indeed, fraud has been used to keep him in such ignorance. If, for

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instance, there is a firm of *A. B.* and *C.*, and a bill is drawn upon the firm of *A. B.* and *C.* by *M.*, and *M.* in fact turns out to be *A.*, there being no distinct firm, in such case there shall be no double proof. Where again a bill is drawn by *C.* upon *A.* and *B.*, and the holder discovers that *C.* is in fact a dormant partner with *A.* and *B.*; there again *A. B.* and *C.* are considered jointly liable only, because there is no distinct firm. The creditor's eyes are then open, and he can only prove against one estate. All the cases confirm the principle, that where there are distinct firms, and no election is made to come upon a dormant partner as an actual partner, there the right to double proof exists. In cases of election, I take the law to be this. If I hold a bill drawn by *A.*, and accepted by *B.*, with 50 indorsers on it, I may prove against every one of the parties to it, till I am paid the amount of the bill. If the bill is drawn by *A.*, and accepted by *A.* and *B.* though at law I may issue execution against the separate estate of *A.*, and the joint estate of *A.* and *B.*, yet bankruptcy will deprive me of this right. The rule in bankruptcy is, that, notwithstanding my vigilance, I cannot do this. Such is the law, but I am certainly unable to discover any reason on which it is founded. In *Ex parte Bevan*, 10 *Ves.* 109, Lord *Eldon* says, " in bankruptcy, for some reason not very intelligible, it has been said, the creditor shall not have the benefit of the caution he has used. I never could see why a creditor, having both a joint and a several security, should not go against both estates. But it is settled that he must elect." The rule itself also was disapproved of by Lord *Thurlow* (*a*), who thought that a joint

(*a*) So stated in argument in *Ex parte Morris*, 1 Mont. 221.

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creditor ought not to be deprived of his right to enforce judgment under a statutable execution, in the same mode as he would have been entitled under a common law execution, by proceeding against both the joint and separate estate of the debtor. [*Sir A. Pell.* Have you found any cases where there are reasons given for this rule in bankruptcy?] None whatever; on the contrary, in all the cases on the subject, there are the dicta of the several judges repudiating the rule. My argument is, that the rule is contrary to law, and against reason and justice. But, at all events, where a creditor is blinded as to the identity of the firms by the fraud of the debtors, there, it is admitted, the rule does not apply, *Ex parte Adam*, 2 Rose, 36; 1 Ves. & B. 493. Though if there are no distinct firms, and the creditor knows that fact, then, as his eyes were open, and he trusted to one estate, he cannot have a right to double proof. This was decided in *Ex parte Bigg*, 2 Rose 37. But where there are distinct houses of trade, though the different individuals are all members of one aggregate partnership, there the right of double proof is allowed. Thus in *Ex parte Walker*, 1 Rose, 441, the facts were these: *A.*, a sole trader, *B.* and *C.* partners, and *D.* a sole trader, engaged in a joint adventure; and for the joint purchase of goods by them, the vendor, with knowledge of their joint interest, received in payment a bill drawn by *A.* on and accepted by *B.* and *C.* It was here held, on the bankruptcy of *A.*, and of *B.* and *C.*, that the vendor was entitled to prove the bill against both their estates; on the ground that this was not the draft of one upon the firm, but of one of several partners drawing upon two partners, a distinct house. In the case of a

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dormant partner the rule is otherwise. As, where there is a firm of *A. B.* and *C.*, and a bill is accepted by them which is drawn by *D.*, and the holder of the bill discovers *D.* to be a dormant partner of *A. B.* and *C.*, and he treats him as such, and elects to fix him in that character, he cannot afterwards waive such election and have double proof. This is so decided in *Ex parte Liddle*, 2 Rose, 34. So where *B.* is a secret partner with *A.*, and *A.* draws bills in his own name on *B.*, the holder has a right, in the first instance to regard him as no partner, and to prove against *B.*'s separate estate, as well as the separate estate of *A.*; or he may treat *B.* as a partner, and prove against the joint estate of *A. and B.*; but he cannot prove against both the joint and separate estates. This is clearly established by the case of *Ex parte Husbands*, in 5 Mad. 419, and *S. C.* on appeal to the Lord Chancellor, 2 Glyn & J. 4. Such are the cases in which the creditor is not entitled to the right of double proof.

Let us now look at those cases where he is so entitled, and these may be divided into two classes. 1. Where there are distinct firms, each consisting of some of the members of the general partnership, and the creditor is ignorant of that fact. 2. In the case of a dormant partner, where the creditor has never made any election to fix such dormant partner as a member of the firm, or done any act to remove his responsibility in his individual character. This principle of distinction is recognized in several cases. Thus in *Ex parte Laforest*, 1 Cooke, 276, where there were two distinct houses of trade, and the creditor was not acquainted with the general partnership, but considered the drawers of the bills and the acceptors as distinct firms, he was held to be entitled

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to double proof. The same point was decided in *Ex parte Benson*, 1 Cooke, 278; and *Ex parte Adam*, 2 Rose, 36; 1 Ves. & B. 493. I may assert without contradiction, that these two classes of cases are those in which double proof is invariably allowed.

If the arbitrary rule, as to the election of proof, is founded on any principle, it is, that the creditor knows to whom he trusts, and he cannot pretend that any deception has been practised on him. But where the debtor has misled the creditor, there he is clearly entitled to double proof; and the creditor may say, you shall take the consequences of your deception.

Now what are the facts of the present case? *Thomas Barrow* and *Co.* are the drawers of the bills, *Thomas Johnston* and *Co.* are the acceptors, *George Geddes* and *Co.* and *Samuel Radcliffe* are the indorsers. There was no evidence whatever on the other side, that *Williams* and *Co.* knew of the identity of the members of these several firms with those of the general partnership. And as there has been no election of the creditor to fix on any one of these firms as dormant partners of another firm, it is quite manifest, that Messrs. *Williams* and *Co.*, as holders of the bills in question, are entitled to double proof.

With respect to the second point in issue, namely, whether the amount of dividends declared under the commission against one firm, should be deducted from the debt before it is proved under the commission against another firm, I confess I do not argue this with the same confidence with which I contended for the other position. The law upon this point is left in great uncertainty; and in the last case on the subject, Lord *Eldon* expressed considerable doubt. In 1 Mont. & G. B. L. 98, 192, where all the cases are collected, it is laid

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down as a general rule, that if a creditor have a joint security from the bankrupt and any other person, or if he have a separate security from a third person, he may prove his debt, against the bankrupt, without a previous sale of the security. So I may prove a mortgage debt, and afterwards sell the mortgage, and may receive a dividend on the whole debt, until I have received 20*s.* in the pound. The case of *ex parte Peacock*, 2 G. & J. 27, fully supports this position. But, on the other hand, I admit, that the contrary has been decided in *Cooper* v. *Pepys*, 1 Atk. 106, where a creditor had received a dividend of 6*s.* in the pound, under a commission against the drawer of a bill, and it was held, that he could only prove to the amount of 14*s.* in the pound against the estate of the acceptor. But that case proceeded on the fact of the dividend having been actually *paid* to the creditor, *before* he proved under the estate of the acceptor. [*Sir J. Cross.* If a dividend has been *declared*, is not that considered a satisfaction *pro tanto?* *Sir G. Rose.* Is not a dividend declared, though not received, held to be money belonging to the creditor in the hands of the assignees, for which an action will lie against them at the suit of the creditor for money had and received?] (*a*) It is merely a *chose in action*, and he may except it in his deposition of proof. In the subsequent case of *Ex parte Wildman*, 1 Atk. 109, Lord *Hardwicke* appeared to recognize the distinction previously taken in *Cooper* v. *Pepys*, hold-

(*a*) In the judgment in *Smith* v. *Duke of Chandos*, Barn. Ch. Rep. 419, a case is cited where a dividend having been declared on a bankrupt's estate, and a creditor under the commission neglected to receive it, and the assignee absconded with the dividend in his hands, it was held, that the creditor could not come upon the bankrupt's estate for the dividend, but must resort to his remedy against the assignee; establishing thereby, that the *declaration* of a dividend is, quasi the bankrupt's estate, tantamount to *payment* of it.

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ing, that a creditor receiving a composition on one estate, *after* he had proved against both, was nevertheless entitled to receive a dividend on the whole sum under the other estate. It is true that in the later case of *Ex parte Leers*, 6 *Ves.* 644, it was decided, that dividends declared against one estate, though not received, must be deducted from the proof against another estate. Yet Lord *Eldon* in that case expressed great reluctance in making such decision. And the same point was decided by him with equal reluctance in the case of *Ex parte The Royal Bank of Scotland*, 2 Rose, 197. [*Sir J. Cross.* The petition states, that you proved under the joint estate without deducting the dividend, and against the separate estate after deducting it.] Still I must contend that the mere declaration of a dividend is not equivalent to payment, and that the creditor can never be said to have received the dividend, till it is actually in his pocket. From what is stated in the case of *Ex parte Leers*, it appears that the rule contended for on the other side is entirely founded on a *dictum* of Mr. *Cooke's;* for upon being applied to by Lord *Eldon* as to the practice at Guildhall, Mr. *Cooke* said, that a dividend declared was constantly deducted; and Lord *Eldon* made the order according to the practice, still expressing doubt as to the principle of it. Upon the whole case then, though I admit that the general rules of bankruptcy may be considered against me on both points, yet, on the first point, I contend that I am within the exception to the rule. And as no sound reason has been stated, on which such rules have been established—after the reluctance too which has been shown by all judges in acquiescing in these rules—I submit, that the Court will be justified in not adhering to a precedent which is

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founded on manifest injustice; and that they will be more disposed on this occasion to follow the example of Lord *Brougham,* who in a recent case before him declared, that he should never consider himself bound by precedent, in a case which militated against his own judgment.

Mr. *Wigram,* in reply, insisted, that whether the rule of law was or was not arbitrary and unreasonable, it was not for the Court to determine. The rule has been now established for a long period, and all judges have concurred in it, though they say they cannot understand the principle on which it is founded. Still, as it has been acted upon for upwards of a century, it has now become the law of the land, and is as binding as acts of parliament themselves. It has been contended on the other side, that the rule depends on the ignorance of the creditor. This forms no part of the rule. The rule is, that when bankruptcy takes place, the joint estate shall be put on one side, and the separate estate on the other. With respect to the first class of cases that have been cited in the argument, it is clear, that where there are three partners in a firm, and all are jointly liable to a creditor, who has also taken the security of each partner in his individual character, in such case there can be no double proof. But I admit, that where there are two joint estates, as where there are five partners, and a joint creditor takes the security of two of them, there he can prove against both estates, if he is ignorant that the two firms consist of the same persons. Is it a rational distinction, that where the parties are in trade the creditor can prove, and not where they are carrying on no trade, but acting merely as private individuals? The case of *Ex parte Husbands,* 2 G. & J. 4,

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is decisive of the present case. There Lord *Eldon* decided, that the holder of bills drawn by the partnership firm upon a dormant partner, though the holder was ignorant of the partnership, was not entitled to prove them against the joint estate of *A.* and *B.*, and the separate estate of *B.*, but that he could only prove them against the separate estate of *A.*, and the separate estate of *B.*

On the second point, as to the deduction of the dividends declared under the commission against *Thomas Johnston*, he was stopped by the Court.

And as to the first part of the case, the Court said they would consider of their judgment.

Cur. adv. vult.

Council Room, Lincoln's Inn, February 20.

The Court on this day proceeded to deliver the following judgments:—

His Honor the Chief Judge.—This case was argued on Friday, the 27th of January, on certain facts stated in the petition, and admitted by the respondents. It appears that *Williams, Deacon, and Co.* were the holders, as indorsees for value, of two bills of exchange, one dated July 23, 1828, for *253l.* 16*s.*, the other dated August 1, 1828, for *382l.* 13*s.* The names of *Thomas Barrow and Co.* appeared on the face of the bills as drawers, *Thomas Johnston and Co.* as acceptors, and *Thomas Barrow and Co., Geddes and Co.*, and *Samuel Radcliffe*, as the respective indorsers. It appeared that *Thomas Barrow and Co.*, the drawers, carried on business as commission agents at Manchester, and that the individuals composing this firm were *Thomas Barrow* and *George Geddes;* that *Thomas Johnston and*

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Co., the acceptors, were warehousemen in London, and that this firm was composed of *Thomas Johnston and George Geddes;* that *Geddes and Co.*, the indorsers, carried on the business of cotton manufacturers at Stockport, and that this firm consisted of *George Geddes* alone; and that *Samuel Radcliffe*, the other indorser, likewise carried on business at Stockport as a cotton-spinner, under his separate name, but in conjunction with *George Geddes; George Geddes* was therefore a joint drawer with *T. Barrow*, a joint-acceptor with *Johnston*, a sole indorser as *Geddes and Co.*, and a joint-indorser with *Radcliffe*. It is admitted, however, that *Williams and Co.*, the holders of these bills, were ignorant that *Geddes* was a partner in the firm of *Thomas Barrow and Co.* [His Honor then, after stating the material facts and the prayer of the petition, proceeded as follows:] It was contended, on the part of the petitioners, that whatever might be the right of the parties at law, in bankruptcy a creditor having the joint security of two partners, and also the separate security of one of the two for the same debt, must elect either to prove against the joint estate of both, or the separate estate of each; but that he cannot prove against the joint estate of both, and also against the separate estate of one. Mr. *Montagu*, for *Williams and Co.*, admits this to be true, where the partner giving the separate security does not carry on any distinct or independent trade; or where the creditor knew the fact of the partnership at the time of taking the security; or had elected to treat the act of the single partner as the act of the firm. But he contends, that where the partner giving the separate security does carry on a distinct trade, and is unknown to the creditor as a

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partner of the firm, and where the creditor has not embarrassed his claim by any subsequent recognition of him as partner, the creditor has a right to double proof against the separate estate of the bankrupt giving the separate security, as well as against the joint estate of himself and partners; and many cases were cited to support this distinction. Mr. *Wigram* in reply insisted, that, to entitle the creditor to double proof, there must be not only a plurality of trades, but a plurality of partnerships, and that it is only where the double security involves a second *joint* estate, that double proof against the same bankrupt can be allowed.

It is not denied, that the position contended for by the respondents is most in accordance with the legal rights of the parties. But the petitioners assert, that the practice in bankruptcy has established a rule in such cases, which, though arbitrary and unsupported by any sufficient reason, is too firmly settled to be affected by the analogy of legal remedies. It became necessary, therefore, to refer to the several cases cited, in order to ascertain to what extent this rule had been carried into practice.

The rule appears to have been first laid down by Lord Chancellor *Talbot* in *Ex parte Rowlandson* (*a*), in the year 1735, where the question arose upon a joint and several bond, and he held, in analogy to the rule applicable to suits at law, that upon a joint and several bond the obligee must in bankruptcy elect to prove it either against the joint *or* separate estates, but that he could not prove it against both. This decision was afterwards acted upon in other cases (*b*). And, by the more

(*a*) 3 P. Wms. 405.

(*b*) *Ex parte Parminster*, 1735; *Ex parte Abingdon*, 1737; *Ex parte Bankes*, 1740; which are all cited in *Ex parte Bond and Hill*, 1 Atk. 99.

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modern decisions, the rule has been extended to cases of bills of exchange, to which the same bankrupt has become a party as a member of a firm and also as an individual. Many objections to this rule have been made, and Lord *Eldon* has in several cases expressed his disapproval of it. In *Gray* v. *Chiswell* (*a*) he says, "it is extremely difficult to say on what the rule in bankruptcy is founded." And in *Ex parte Bevan* (*b*), "I never could see why a creditor, having both a joint and several security, should not go against both estates." It would be easy, indeed, to point out many inconsistencies that arise upon the application of the rule. But in the cases last mentioned Lord *Eldon* adds, "that it is settled that the creditor must elect." And the question before the Court is properly raised, not upon the propriety of the rule itself, but upon some supposed exceptions to it, within which this case is said to range itself. The cases which have been cited as affording instances of such exceptions do not appear to me to bear upon this question; such as those cited from Mr. Cooke's Bankrupt Law of *Ex parte La Forest* and *Ex parte Benson* (*c*), and also the cases of *Ex parte Walker* and *Ex parte Wenslay* (*d*), from Sir George Rose's Bankruptcy Reports. These cases are not, strictly speaking, instances of double proof, but rather of distributive proof against the different members of one partnership.

The attempt made now is to prove the same debt twice against the same party; and the only instance I find of double proof allowed against the same parties is in the case of *Ex parte Adam* (*e*), where the holder of a bill of exchange drawn by five persons trading under

(*a*) 9 Ves. 126. (*b*) 10 Ves. 109.
(*c*) 1 Co. B. L. 263. (*d*) 1 Rose, 441. (*e*) 2 Rose, 36.

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the firm of *Cooke and Co.* on two of the members of the partnership carrying on a distinct trade as *Harrison and Co.*, was admitted to prove it against both estates, as he was ignorant of the connection of the parties when he took the bill. This case supports Mr. *Montagu*'s argument to some extent, as an instance of double proof against the same bankrupts. But then its circumstances fall within the limitation contended for by Mr. *Wigram*, the proof being against two *joint* estates, and not against a *joint* and a *separate* one. It still, therefore, leaves the question undecided, whether such proof would be allowed, if the acceptance had been by an individual member of the firm carrying on a distinct and independent trade.

The next case is that of *Ex parte Bigg* (*a*), in the same volume of Reports, and is one of a separate security by an individual partner. But the circumstances of that case do not furnish a decisive answer to the question; for there the drawer of the bill was not a distinct trader, and the creditor knew of the connection of the parties; whereas the holder's ignorance of that fact was dwelt upon by the Chancellor in *Ex parte Adam*, as the ground of his judgment. At the same time it must be observed, that Lord *Eldon*'s language in *Ex parte Bigg* points directly to the distinction taken by Mr. *Wigram*. In the subsequent case, however, of *Ex parte The Bank of England* (*b*), the individual party to the bill was also a distinct and separate trader; and that fact was held by Lord *Eldon* not to entitle the creditor to a double proof; and his lordship there again refers to the distinction pressed upon us by the petitioner. Still it is answered, that that case does not destroy the

(*a*) 2 Rose, 37. (*b*) 2 Rose, 82.

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principle upon which the argument for the respondents rests; for there the creditor *knew* that the parties were partners, and great stress is laid upon that fact; whereas in the case before the Court it is admitted, that *Williams and Co.* were ignorant of the connection between *Geddes* and the drawers; and it is urged, that the same principle which would allow double proof against *two* of the partners, as in the case of *Ex parte Adam*, would also apply to the case of a single partner carrying on a separate ostensible business, having a distinct recognized stock as a commercial house, to which the holder of the bill might be supposed to have looked, as well as to the joint stock of the house of the drawers. There are, however, some obvious distinctions which might be pointed out. But it would be vain to attempt to settle, by reference to principle, the exceptions to a general rule admitted to be arbitrary, and to have no sound principle to rest upon. The practice which has established the rule must also settle its limits. And I am glad to be relieved from the task, by finding that the rule of practice has been applied to this case by one, whose long experience and profound knowledge of the subject have best qualified him to fix the correct limit. The case of *Ex parte Husbands* (*a*) has already decided this very question. For in that case the individual partner was also a separate trader, and the creditor was ignorant of the partnership; and yet both Sir *J. Leach* and Lord *Eldon* (though on another point they differed) agreed in this, that a double proof against the joint estate of the drawer, and also against the separate estate of the acceptor, who was a partner in the firm of the drawer, was not to be allowed.

(*a*) 5 Madd. 419; 2 G. & J. 4.

In this case, therefore, I think the creditors must elect. My judgment is founded on this: I find the general rule arbitrary, but invariably acted upon by all Judges in matters of bankruptcy. I find no case carrying the exception to a *single* partner separately trading; but, on the contrary, expressions of Lord *Eldon* confining the exception to separate *partnerships;* and there is besides an express decision on the point in the case I have just mentioned of *Ex parte Husbands.*

I am also of opinion, that if Messrs. *Williams and Co.* elect to prove against the joint estate, the amount of the dividends declared under *Johnston*'s commission must be deducted, and the proof reduced to 555*l.* 10*s.* 2*d.* This point appears to have been settled in the case of *Ex parte Todd* (*a*), and the reasons given for the decision have been unanswered.

His Honor Sir A. Pell.—I am sorry to say, that I cannot concur in the opinion of his Honor the Chief Judge. The question that has been argued is one of great importance; for it extends beyond the case immediately before us, and affects in some degree the whole circulating medium of the country. The ground of the objection to the right of double proof is, that there is an arbitrary rule in bankruptcy to this effect, " Where a creditor has a joint and separate security, either by the same instrument, or by different instruments, he must elect whether he will proceed against the joint or the separate estate in preference; reserving his right to come upon the other estate, if there is a surplus of that estate beyond the payment of its own debts." Now

(*a*) 2 Rose, 202, *note.*

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let us stop here to inquire whether this rule is consistent with law? Unquestionably it is not. Is it consistent with justice? It is almost admitted that it is not. I should, therefore, in this case require the most absolute and positive authority for the existence of this rule, before I can consider myself bound by it. Let it not be supposed, that placed as I am in this new situation I wish to run counter to those opinions of sage and learned men, which have been cited in the course of this argument, and are to be met with in the books. That is far from my intention. Still I hold it to be the duty of an English Judge upon all occasions openly but decently, and I may say reverently when it affects any decision of Lord *Eldon*, to declare his honest and sincere opinion. The rule is admitted to be an arbitrary one; and all Judges say they cannot understand on what principle it rests. In the case of *Ex parte Bevan* (*a*), Lord *Eldon* says, "In bankruptcy, for some reason, not very intelligible, it has been said, the creditor shall not have the benefit of the caution he has used. I never could see why a creditor having both a joint and a several security should not go against both estates." In other cases, too, Lord *Eldon* has expressed himself to the same effect. And in the very case which His Honor the Chief Judge has laid such stress upon, I mean the case of *Ex parte Husbands* (*b*), Lord *Eldon* lays down the exception to the rule, which would seem to have led to a decision contrary to the judgment in that case pronounced by him; though the judgment in that case turned upon a point other than the one now before the Court. For he says, "It is clear, that where a party takes a bill, drawn by some mem-

(*a*) 10 Ves. 106. (*b*) 2 G. & J. 4.

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ber or members of a firm carrying on a distinct trade, in the firm, in ignorance that the drawers constitute part of the firm of the acceptors, proof is admitted against both the drawers and acceptors."

But the rule contended for being so arbitrary, and as it appears to me so unreasonable, I thought it right to refer to the first case upon the subject, *Ex parte Rowlandson* (*a*), which was decided by Lord *Talbot* so long ago as the year 1733, nearly a century back. That was a case upon a bond, by which the bankrupts, *John Crosfield* and *James Birket*, who were partners, were bound jointly and severally to *Rowlandson;* and Lord *Talbot* held, that *Rowlandson* might choose against which estate he would come, but that he should not come against both. But let any man ask himself, whether a joint and several bond is like the case of a bill or note. On a joint and several bond you must make your election in proceeding at law against the obligors; you must either sue them jointly, or separately. So, you cannot proceed against two of three joint obligors, but you must either go against all, or each separately. But in the case of a bill of exchange you may proceed against all the parties to it, until you have got full satisfaction for your debt. And even in the case of a bond, if the obligee sues the obligors jointly, and recovers judgment, the plaintiff in such case is at liberty to take the joint, as well as the separate, effects of each of the obligors in execution. The arbitrary rule, therefore, which is so strenuously contended for in this case, appears to me to stand upon a very sandy footing.

I come now to the second branch of the argument, namely, whether this case falls within the line of distinc-

(*a*) 3 P. Wms. 405.

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tion which is laid down by Mr. Cooke (*a*), and recognized by Lord *Eldon*. The distinction taken is this: where bills are drawn by *all* the *partners* upon a *distinct firm* constituted of some of them, a party may prove against both estates if he was *ignorant* of the connection of the parties, but not when he was aware of their identity. I may observe here, that this Court is one both of law and equity; and the point of law and equity in this case seems to me as clear as the sun at noon-day. We have here one firm composed of various persons trading under different firms, and it is not known to the holder taking the bill, that those different firms belonged to one partnership. I think it would be a species of doctrine prejudicial to the interests of the public, to say, that in such case the holder cannot prove against all the parties to the bill; and, therefore, if I can find any cases that will assist me in the view I take of this subject, I shall avail myself of them to decide according to common law, reason, and justice. The cases of *Ex parte Laforest* and *Ex parte Benson*, in the 1st volume of Mr. Cooke's Bankrupt Laws (*b*), are so strong upon this point, that I can hardly draw any distinction between those cases and this. The facts there are nearly similar to those of the present case. So, the more recent case of *Ex parte Adam* (*c*) is confirmatory of the same doctrine. Indeed, where paper is negotiated in this country to such an extent, it would be most fatal to the interests of commerce, to prevent a bill-holder from availing himself of his security to its fullest extent. In the case of *Ex parte Bonbonus* (*d*) Lord *Eldon* says, "There have been many cases, particularly in the bankruptcy of *Burton*, *Forbes*, and *Gregory*, where

(*a*) 1 C. B. L. 261. (*b*) Page 251. (*c*) 2 Rose, 36. (*d*) 3 Ves. 546.

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three or more partners *being also concerned in other trades,* the paper of one firm was given to the creditors of another, and they were permitted to take dividends from both estates. That therefore takes it out of the general doctrine."

In this case, the paper negotiated by the bankrupts was accommodation paper. *Williams and Co.*, the holders of the two bills of exchange, gave a full and valuable consideration for them, amounting to 641*l.* 9*s.* There are names of four or five different firms appearing on these bills, which are in truth one and the same firm, though each of those firms is apparently carrying on a distinct trade at a distinct place. The holder, in ignorance of these facts, trusts to the deceitful appearance of the bills, and finds that he has taken nothing but trash. Is he to be told then, because the parties become bankrupt, that there is an arbitrary rule which deprives him of the remedy he is entitled to at law, and that he can only prove the amount of the bill against one of these firms? As such a decision would, I think, be contrary to law and justice, and contrary also to the principle of those cases which define the exception to the arbitrary rule contended for, upon these grounds I must say, in my judgment, that *Williams and Co.* are entitled to double proof.

As to the deduction of the dividends, I concur in opinion with his Honor the Chief Judge.

His Honor Sir J. Cross, after referring to the facts of the case, thus proceeded:—It has been stated on all hands as a general rule, that when a party holds a joint and separate security, he must in bankruptcy make his election, whether he will go against

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the joint or separate estate. The reason of the rule it is difficult to discover; but it will not be necessary in this case to disturb that rule. In *Ex parte Adam* (*a*), however, where there were five partners, two of whom carried on a distinct trade, Lord *Eldon* permitted the creditor to prove against both estates. It is not denied, therefore, that there is this exception to the rule,—namely, where there are distinct firms, and distinct trades, and the creditor did not know they were all the same as the partners in the larger firm. This was clearly settled by *Ex parte Adam.*

But there is another rule, it is contended, which prevents the exception extending to the case of an individual partner carrying on a separate trade. If there be such a rule, of course, we are bound to submit to its authority. But I have read every case on the subject, and I cannot discover any such rule. Let us see, therefore, whether there is any foundation in reason to support it. In *Ex parte Bigg* (*b*), it is true, that double proof was not admitted; but not on the ground that the drawer of the bill was merely an individual partner, but because he was not a distinct trader. And though in *Ex parte The Bank of England* (*c*) one of the parties to the bill was merely an individual trader, yet Lord *Eldon*'s judgment against the right of double proof did not proceed on that ground, but because the bill-holder *knew* of the partnership of the parties when he took the bill. No allusion whatever is made to any distinction, that the exception to the rule does not apply to an individual partner, as well as to several. And in the case of *Ex parte Sillitoe*, 1 G. & J. 383, Lord *Eldon* says, "Another relaxation of the rule was ad-

(*a*) 2 Rose, 36. (*b*) 2 Rose, 37. (*c*) 2 Rose, 82.

mitted, that where there is a demand arising from a dealing by the partnership in a distinct trade, proof might be admitted. But then the question, what is a dealing in a distinct trade, is always to be looked to with great care. I apprehend, that the principle does not apply more to two persons who happen to be constituent members of a partnership of six, than to one or each of the six, if one or each was a distinct trader." From the tenor, therefore, of this judgment of Lord *Eldon*, it would seem, that there is no distinction, whether the separate trade is by one partner alone, or by several in a minor partnership.

As to the case of *Ex parte Husbands*, which has been supposed to decide the one before us, that was a case in which the creditor took a bill drawn by a trader upon a dormant partner, and on the bankruptcy of both partners, the creditor, then knowing of the partnership, proved the bill against the joint estate; and, after making that election, petitioned to prove also against the separate estate of the dormant partner. The creditor had in that case, therefore, made an option, in respect of an implied contract on the bill, which did not appear on the face of the bill itself; and it was held, that he might withdraw his proof against the joint estate, and prove against the separate estate of each partner, according to the contract appearing on the bill, which was several and not joint. There is a material distinction, therefore, between that case and this. In the present case the bill is drawn not by *Thomas Barrow* alone, but by *Thomas Barrow and Co.*, the words "and Co." meaning *Geddes*, who was a partner with *Barrow*, though they do not disclose, *per se*, that *Geddes* was so meant. There is, however, an express joint contract

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of *Barrow and Geddes*, those two persons carrying on business at Manchester under the firm of *T. Barrow and Co.*, and the bill was indorsed by *Geddes*, who carried on a distinct trade at Stockport under the firm of *Geddes and Co.* There is every ingredient here, then, to entitle the creditor to double proof, if the existing rule does not prevent him. There are two distinct firms, without any knowledge by the creditor, that the party composing one of the firms was a constituent part of the other. For the holders of these bills had no right to suppose, that *Geddes* was a partner with *Barrow* at Manchester, or that *Geddes* had no partner at Stockport. I have applied my mind to discover some reason for the distinction contended for between the case of a major and a minor partnership, and that of an individual trader a member of a partnership, and can find none. I am of opinion, therefore, that the double proof ought to stand, subject only to be reduced by the amount of dividends declared under the commission against *Johnston*.

His Honor Sir George Rose.—Messrs. *Williams and Co.*, at the time of the bankruptcy in which this petition is presented, were, and now are, the holders, for valuable consideration, of a bill of exchange, on which (amongst others) are two several indorsements; the one that of a firm of *Barrow and Co.*, and the other that of an individual, *George Geddes*. The firm of *Barrow and Co.* consist of *Thomas Barrow and George Geddes*, and carry on the business of commission agents at Manchester. *George Geddes* is the same individual trader who is included in the firm of *Barrow and Co.*, and carries on a distinct business as a cotton-spinner at Stockport. *Barrow and Geddes* have both become

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bankrupts, whether under a joint commission against them both, or under distinct commissions against them separately, is altogether immaterial; for the question is not at all influenced by the form of the commissions, it is one merely of administration of assets, which in bankruptcy are (with an exception for this purpose unnecessary to be noticed) always administered according to the rules of a Court of Equity; and an equitable administration of assets is not at all affected by the mode in which the insolvency has been declared, or is in prosecution; whether under a joint commission against all of a firm, or under several commissions against the component members of it, the principle is the same.

Williams and Co., when they received this bill, were, it is admitted, ignorant that *George Geddes* was included in the firm of *Barrow and Co.*; a circumstance which has been considered material in those cases, where the question of two proofs upon a bill of exchange has been raised. And the point upon which, from a difference of opinion in the Court, our judgment has been deferred till to-day, is simply this: Have Messrs. *Williams and Co.* a right to prove against the joint estate of *Barrow and Geddes*, in respect of the indorsement *Barrow and Co.*, and also against the separate estate of *Geddes*, in respect of his separate signature? Now here it must be understood, that there is no dispute that the holder of a bill can prove against every name upon it, until he shall have received twenty shillings in the pound; that there is no doubt as to the effect of the contract, either in law or in equity; that the contract, as in law so in equity, binds both *Barrow* and *Geddes* jointly, and *Geddes* separately; but the difference between the two branches of jurisprudence is

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this, that the *law* looks at the contract as one to be enforced through the individual contracting parties respectively, without any other qualification, either in regard to the state of the fund, or to the claims of other creditors; but *equity* qualifies the relation of the individual contracting parties, by a convenient attention to the remedies of other creditors of the same debtor; and (by substituting the remedy against the assets for the claim against the person, and assuming that there are many other claimants against the same insolvent,) it modifies the rights of creditor and debtor by operation against the estate, instead of the individual. The rule appears to me not to be an arbitrary rule, in the sense in which that appears to be understood, but obviously the result of this principle.

It is too obvious to require a remark, that Messrs. *Williams and Co.*, if they had thought fit, might have brought an action against *Barrow* and *Geddes*, or against *Geddes* simply; they might have taken out execution against the joint property of *Barrow* and *Geddes*, as well as the separate property of *Barrow*, and the separate property of *Geddes*. But, on pursuing this their remedy by action, they must have taken their chance, whether, when they had followed it to execution, they could have got any part of the property, or any thing beyond the persons of their debtors: for other plaintiffs might have been before them; judgments might have been confessed; voluntary assignments, or other proceedings or events, might have devested the property; and, in point of fact, this very commission, a statutory execution, has done so. They have therefore elected to come in under this statutory execution, and in so doing have elected to abandon

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that right which the law would have given them, when they tender their proof under the commission. They withdraw their debt voluntarily from the legal operation of the contract, and submit it to be regulated by the principles upon which assets are administered in bankruptcy.

It has not been denied, that it is an universal maxim in the administration of assets in equity, that the separate estate shall be applied in the first instance to the separate creditors, the joint estate to the joint creditors. Mark the distinction: equity does not alter the legal contract; it does not say that the joint creditor shall not be paid out of the assets of both his debtors; but it says only, that a commission stops the diligence or action of all the creditors, so that they are all, as it were, to start fair with the commission, as if all their executions had come to the sheriff at the same time. All the joint creditors shall go *first* to the joint estate, and the separate creditors *first* to the separate estates; and if there be a surplus of the joint estate, it is carried, according to the interest of the partners, to the respective separate estates; or if a surplus of the separate estates, it is carried to the joint. The contracts are not varied, but, from convenience,—applied upon equitable principles to insolvent estates amongst creditors, whose equitable executions, by the effect of the bankruptcy, are all of equal date, or contemporaneous,—their satisfaction is thus marshalled or arranged *against*, but not confined *to*, their respective estates.

An ordinary partnership debt is, in law, and in equity likewise, both joint and several: even at law the action lies against one of the two, subject only to a plea in abatement: by execution in an action against both, you

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may get both joint and several property; for the law contemplates *solvency*, proceeds upon *solvency*, or ample means of satisfaction, either in person or property. But equity in bankruptcy proceeds upon *insolvency;* it does not vary, but only suspends the contract, and that only as long as the assets are inadequate. If there should be a surplus of the separate estates, or of the joint estate, the creditor has the same resource to them as he would have had under his common law execution.

True, say *Williams and Co.*; and upon that principle we are willing to forego the right which the law would have given us against *Barrow and Co.* upon that indorsement; for, as to that, we have nothing but the joint and separate contract by operation of law; but, as to *Geddes*, we have his separate express contract by indorsement. Is that to give us nothing? Certainly it is to give you something; it gives you the benefit of election, which without that separate indorsement you would not have had. But then say they: *Geddes* is a separate *trader*, and we are the holders of a commercial contract? But is not the answer obvious? What difference can the circumstance, that *Geddes* is a separate trader, make, unless the law, or equity, or bankruptcy distinguishes his separate trading stock, as a distinct recognized stock, from his general assets? The law in every mode, either by common law execution, equitable decree, or bankruptcy, looks for the satisfaction of his contracts to his estate, without stopping to distinguish whether it be a debt to his butcher, his baker, his tailor, or one incurred in his trading speculation. When you, *Williams and Co.* took the note, you looked to the joint means of *Barrow and Geddes*

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in the one instance, and the separate means of *Geddes* in the other, whether trader or not; you got no special contract for the separate trading stock; you looked to all his property, his estate in Hampshire, if he had one, as well as at Chester; and his other creditors, whether for trade debts or not, did precisely the same.

It is needless to go through the cases, for not one has been cited, that affects the rule, that you cannot prove against both the joint and separate estate of the same individual; or, I would put it thus—wherever your common law execution would give you both estates, then, under the equitable execution, in which you all come in together upon insolvency, you must each take your own estates in the first instance, not exclusively, but in the first instance subject only to a right of election, which we all know is in the petitioning creditor, as perhaps the first execution creditor, and to a right of election, as in this case, where there is express contract.

From the first to the last of Lord *Eldon's* judgments, from that of *Ex parte Bigg* (*a*) down to the last case of *Husbands* (*b*), this principle is established; and in the last case, if Lord *Eldon* had thought otherwise, he would have directed the proof against the joint and the separate, instead of the two separate, estates. In the case of *Blackburn* the omission of the word *Co.* can make no difference; whether the firm be *Blackburn* simply, or *Blackburn and Co.*, the legal result must be precisely the same as to all its consequences.

Let us try all the cases by that of *Ex parte Walker* (*c*). *A. B. C. and D.* are engaged in a joint adventure; *A.* draws on *B. and C.*, who happen to be

(*a*) 2 Rose, 37. (*b*) 2 Glyn & J. 4. (*c*) 1 Rose, 441.

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partners in a distinct adventure, and the bill is proved against *A.*, and against *B. and C.* The fact of *A.* being in partnership would have prevented a bill drawn by *A.* on *A. B. C. and D.* from being proved against *A.*, and against *A. B. C. and D.*, because it would have given to the creditor, twice over, payment out of funds in which *A.* was interested; but *A.* was not interested in the property of *B. and C.* the acceptors, and *B. and C.* were not interested in that of *A.* the drawer; in proving against *A.*, therefore, the holders came into no competition with *B. and C.* In this kind of cases to which I have last adverted, it is mentioned, that the proof depends upon the ignorance of the parties that the firms are connected. In that respect, the Court in bankruptcy was perhaps rather legislating upon the policy of checking accommodation paper, than applying an ingredient which ought in fairness to qualify the express contract of the parties.

Upon the whole, therefore, I think there must be in this case an election; but as the decision is against the finding of the commissioners, no costs can be given. The costs must be assigned out of the estate.

The dividends declared must of course be deducted from the proof.

Ex parte Dodds, in the matter of Dodds.

January 27.

When bankrupt abroad, the time for his surrender will be enlarged.

THIS was the petition of the bankrupt, to enlarge the time for his surrender to the commission and for passing his last examination, the bankrupt being abroad when the commission issued. The petition being supported

by an affidavit of the bankrupt, as to the facts stated in the petition, the Court made the order accordingly.

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In re Dodds.

Mr. *Rogers* for the petitioner.

Ex parte Rolfe and Milne, in the matter of Johnson. *January* 27.

When mortgaged property is sold, and the same solicitor is concerned for the assignees and the mortgagee, a separate solicitor should be appointed for the purposes of the sale.

THIS was a petition for the sale of an estate mortgaged by the bankrupt, which was presented by his assignees, one of whom was the mortgagee of the property in question. The premises had been already put up to auction, but there had been a reserved bidding by consent, and no sale actually took place. The petition therefore prayed, that the Court would appoint a time for the sale; and as one of the two assignees was also the mortgagee of the estate, that the sale might be conducted by the other assignee, with the usual leave for the mortgagee to bid at the sale, and the costs of the sale to be paid out of the proceeds.

The Court ordered a sale, in the terms prayed, in three weeks' time; but under the circumstances thought it right, as the same solicitor was concerned both for the assignees and the mortgagee, that for the purposes of the sale a separate solicitor should be employed.

Mr. *Swanston* for the petitioners.

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January 27.

A creditor petitioning to supersede must not only state that he was a creditor at the time of issuing the commission, but also at the time of presenting his petition.

Ex parte FLIGHT, in the matter of BATEMAN.

THE petition was presented in this case by a creditor of the bankrupt, with a view to supersede the commission, on the ground that the party found a bankrupt had not been a trader within the statute. After setting forth that a commission had issued, and that the party was found a bankrupt, the petition proceeded to state, "that the said *James Bateman* was not, at the date and suing forth of the said commission of bankrupt, nor had he previously been, a broker, or agent, or a trader within the true intent and meaning of the bankrupt laws. That the said *James Bateman, at the date and suing forth of the said commission,* was justly and truly indebted to petitioner in a large sum of money."

Mr. *Wakefield,* in support of the petition. The affidavit of the petitioning creditor, which has been filed in opposition to the prayer of this petition, states that evidence was adduced before the commissioners, that the bankrupt was a trader generally; but the petitioning creditor does not swear *what particular trade* the bankrupt carried on. He was bound to specify the identical trade, when we positively deny every kind of trading whatever.

Mr. *Koe,* on behalf of the assignees, took a preliminary objection, that the petition did not state that the petitioner was, at the time of presenting the petition, a creditor of the bankrupt; but merely that the bankrupt *was, at the date and suing forth of the commission,* indebted to the petitioner. A creditor petitioning to supersede ought to state, that the bankrupt *now* is

indebted to him; for his debt may have been satisfied since the issuing of the commission (*a*). 1832.

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The Court, upon this ground, dismissed the petition with costs.

Mr. *Quin* for the petitioning creditor.

(*a*) And see *Anon.* 2 Mad. 281.

Ex parte William Lowe and Richard Cuttill, in the matter of Abraham Aaron. *January* 28.

THIS was a petition of appeal from an order of the Vice-Chancellor, which had been presented to and answered by the Lord Chancellor, to be heard on the then next day of petitions, which was the 9th of January last. Owing to other matters being then before the Court, the petition was not heard by his lordship. The new Bankrupt Court Act coming into operation on the 11th of January, a doubt arose whether the Lord Chancellor would hear the petition. After previous application (*b*) to the Lord Chancellor on the part of the petitioner,

This Court has jurisdiction to hear a petition of appeal in bankruptcy from the Vice-Chancellor's decision to the Lord Chancellor, provided the party prefers a fresh petition addressed to this Court, for the purpose of having such petition heard. But see *post, Ex parte Benson.*

Mr. *Twiss*, on the 24th of January, applied for and obtained *ex parte* an order to transfer the petition into the paper of their Honors, under the General Order (*c*) of the 16th of January, 1832. 24th January.

On the following day Mr. *Jacob*, for the respondents 25th January.

(*b*) See *ante*, 43. (*c*) See *ante*, xxxi.

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Ex parte AARON. 28th January.

in the petition of appeal to the Lord Chancellor, moved to discharge that order; but not having given notice of the motion it stood over until this day.

Mr. *Montagu* and Mr. *Jacob* now appeared in support of the motion to discharge Mr. *Twiss*'s order. The first question that occurs in this case is, whether the Lord Chancellor and his Court can deprive the suitor of his right to have his cause heard before that tribunal to which he has appealed. 2. Whether, on any petition already heard and decided by the Vice-Chancellor, this Court has jurisdiction to rehear it. 3. Whether this Court can compel either of the parties to an appeal from the Vice-Chancellor's decision, which is actually pending before the Lord Chancellor, to quit his lordship's Court and come here to have the appeal decided; whether, in fact, this Court has a sole, or only a concurrent, jurisdiction in matters of bankruptcy. Now we submit, that this Court cannot, of its own authority, hear this appeal, without the consent of both the litigant parties. Every suitor has the privilege of selecting the Court, in which he will have his cause tried. This right has existed for centuries; and when he has exercised this right, by instituting his suit in the Court of his choice, no other Court can compel him to change the tribunal he has appealed to. Neither of the Courts of King's Bench, Common Pleas, or Exchequer, has any such power, as that sought to be exercised in the present case. They are all Courts of concurrent jurisdiction, no doubt; but a cause must be tried in that Court, where it was originally commenced. For when two Courts have concurrent jurisdiction, it would be an answer to any proceeding in the one, that there was a

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process for the same cause depending in the other. So, the Lord Chancellor sitting in equity cannot say to a suitor, you shall try your cause in the Court of Exchequer, or at the Rolls, and not in the Court of Chancery; nor, where a bill is filed for an account, can he compel the plaintiff to go for relief to a Court of law. The same principle applies also to proceedings by *habeas corpus*, in which the party applying for the writ has a right to go before any Court or Judge he pleases. Upon the establishment of a new Court like this, it would be a dangerous innovation, to hold that the former Court had not concurrent jurisdiction with the new Court, and that the suitor should be deprived of his former right of election. It is not contended, that a party may not in the first instance present his petition to this Court; but then either party has in every case a right to appeal from the decision of this Court to the Lord Chancellor. Therefore, generally speaking, it may be said, that this Court is subject to the jurisdiction of the Lord Chancellor. Now, the object of the Bankruptcy Court Act, as stated in its preamble, is, that the rights of bankrupts and their creditors may "be enforced with little expense, delay, and uncertainty as possible." If this Court, therefore, has power to rehear a petition, which has been already heard by the Vice-Chancellor, and after this rehearing another hearing takes place on appeal from this Court to the Lord Chancellor,—as would most probably be the case, if either party was dissatisfied with the judgment here,—the professed object of the act would be entirely frustrated. But the new act never intended to take from the Lord Chancellor the jurisdiction he previously possessed in matters of bankruptcy, nor that he should

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commit a judicial suicide, by transferring to this Court an appeal from the Vice-Chancellor's decision to himself. Most extraordinary evils would result, if the Chancellor's jurisdiction in bankruptcy was held to be abolished; for the Chancellor alone can sign the bankrupt's certificate, or issue a *supersedeas;* this Court has no power to do either. Then how can effectual justice be done in this case, even supposing that the transfer of the petition was correct? For the petition, amongst other things, prays for a *supersedeas.* But the Lord Chancellor alone has the custody of the great seal, which must be affixed to that writ before it can issue. The petitioners, therefore, pray for relief, which no one but the Chancellor can give.

Again, the 6 *Geo.* 4, c. 16, s. 13, makes regulations as to the bond to be given to the Chancellor upon issuing a commission, and the particular mode in which the bond is to be assigned; and the 12th section of the new act recognizes the bond, as still to be given to the Lord Chancellor upon issuing a fiat. Now, has this Court any power to assign the bond, or to order the Lord Chancellor to assign it? Or, is it not still a matter for his personal consideration? So, there are various other powers given to the Lord Chancellor by the 6 *Geo.* 4, c. 16,—as by section 18 to substitute a petitioning creditor's debt; by s. 60, to expunge a debt; by s. 66, to order a new assignment; by ss. 75, 76, to order the disposal of the bankrupt's lease; by s. 78, to order the bankrupt to join in a conveyance; by s. 79, to order a conveyance to new trustees; by s. 111, to order the payment of dividends. Does the new act repeal all or any of these sections? If not, then the Chancellor's jurisdiction as to all these matters still

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continues. The only instance in the new act, from which any inference as to the extinction of the Lord Chancellor's jurisdiction could be drawn, is in the first schedule of fees to be taken by the Chancellor's Secretary of Bankrupts. There, the only fee allowed for any petition is for a petition of appeal from this Court. But, as there are many cases in which it is too clear to doubt the Chancellor's power to entertain petitions, it is evident that the act did not, by that provision alone, take away the Chancellor's jurisdiction. For instance, the Chancellor is empowered to annul a *fiat*, by the 19th section, and a petition is necessary for that purpose; but in the schedule no mention is made as to the fee on any such petition.

The Lord Chancellor is, therefore, still the supreme judge in bankruptcy, and his jurisdiction cannot be taken away unless by express enactment. But then the Lord Chancellor has no power to transfer any petition for hearing before this Court. This will plainly appear, by comparing the provisions of the new act with the 53 *Geo.* 3, c. 34,—the act for appointing the Vice-Chancellor,—which expressly gives the Lord Chancellor power to transfer a bankrupt petition to be heard by the Vice-Chancellor. Now the legislature, having the Vice-Chancellor's act before them, would surely have inserted in the act for establishing this Court a similar clause, had it been in contemplation to give the Lord Chancellor such a power of delegation. Again, had the legislature intended the Chancellor's jurisdiction to be put an end to, why was there not inserted a clause similar to that in the recent act for abolishing the Welsh judicature, (11 *Geo.* 4 and 1 *Will.* 4, c. 70, s. 14;) which not only appoints a new mode of judicature, but the 14th section expressly

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annuls the power of the former judges, and directs all proceedings and all causes then depending to be transferred to the Courts of Chancery and Exchequer. The same provision is made also in this very Bankruptcy Court Act, as to the jurisdiction of the commissioners. For, after providing for the appointment of new commissioners, it is expressly enacted by the 39th section, that all power, jurisdiction, and authority of the former commissioners shall cease and determine, and that every commission depending before them shall be removed into this Court. It may be inferred, therefore, from this specific enactment as to the commissioners, that the meaning of the act was, that the Chancellor's jurisdiction should continue: for the mere creation of a new Court does not necessarily annihilate the old one. It was observed by Lord *Eldon* upon one occasion, that the jurisdiction of his Court was not abolished by the establishment of a new Court. In like manner it has been decided, that the 1 *Will.* 4, c. 21, enabling Courts of law to issue commissions for the examination of witnesses abroad, will not prevent the Lord Chancellor from issuing such commissions, just as he did before the passing of that act. The utmost extent of the new statute is, to create a new Court of concurrent jurisdiction, which may be plainly seen by a reference to the 2d, 3d, and 11th sections of that act; for, considering all these sections together, any doubt upon the subject will be effectually removed. There is nothing in any one of them, which can be construed to take away the Lord Chancellor's jurisdiction. But even if it is abolished, it is not abolished as to matters actually pending before him; for it must have been apparent to those who framed this act, that various

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things would remain to be done by other Courts, when the act came into operation. Neither is there any thing in the 11th section, which can be held to give to the Lord Chancellor a power to transfer to this Court a petition like the present. It would require, indeed, some more explicit words in the act to transfer such proceedings, and thus enable either of two suitors to interrupt the regular process of the cause, and force the other to an additional and unnecessary hearing. It is a clear proposition, that no Court can enlarge its own jurisdiction, which the legislature has expressly defined. Now the question in this case depends, mainly, on the 2d section of the act for the establishment of this Court. The words in that section are, that this Court "shall have superintendence and controul in all matters of bankruptcy;" but it is not said, that it is to have "*sole*," "*exclusive*," or "*supreme*" superintendence and controul. If the controul was to be exclusive, the legislature would have given this Court a power to issue a *supersedeas*, which can only be done by the Chancellor. Now, can it be said, that the Lord Chancellor must affix the great seal to a *supersedeas* by the order of this Court, and that the highest legal functionary is thus to become the ministerial officer of an inferior tribunal? The same argument applies also to the allowance of the bankrupt's certificate, and the issuing of the *fiat*. There is often a competition between the creditors for a London, or a country, *fiat;* and that question ought to be decided only by those functionaries, who have the power to issue it. Could this Court order the Master of the Rolls to issue a *fiat?*

But it is obvious, from the 17th, 18th, and 19th

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clauses of the act, that the intention of the legislature was to preserve the jurisdiction of the Lord Chancellor. In the 19th section, which gives the Lord Chancellor power to annul the *fiat*, upon the reversal of any adjudication of bankruptcy, these remarkable words are added, "or for such other cause as he shall think fit." How is the Chancellor to exercise this power, except upon an original jurisdiction? And how can a sufficient cause appear to the Lord Chancellor, except what the parties themselves shall state to him on petition and affidavit? But why is it, that the same power was not given to the Lord Chancellor, with respect to *commissions* already issued, as the power over *fiats* that were to be issued? The reason is plain. Because it was notorious, that he previously possessed that power. The *fiat* being a new proceeding, it was necessary to give him the express power of annulling it, as he previously possessed in regard to a commission; the object of the act being, that he should have no less power over the *fiat*. Then, is it to be supposed that the Chancellor is to have less power over the old commissions formerly issued by him, than he is now given in regard to the fiat? If the new act is to be so construed, that all petitions for further directions pending before the Lord Chancellor shall be taken away from his decision, and transferred to this Court, then the Lord Chancellor would not have the power to rehear a petition, which had been previously heard before himself,—for the case of *Ex parte Baker* (*a*) decides, that the suitor has a right to apply for such rehearing,—and this Court would then have to sit on the judgment of the Lord Chancellor; a consequence which could

(*a*) Mont. & Mac. 279.

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never have been intended by the act of parliament. And it would lead also to this monstrous absurdity; that as the party has a right of appeal from the decision of this Court to the Lord Chancellor, his Lordship would be called on to rehear his own judgment, after it had been adjudicated upon by this Court.

If this Court, however, can bring petitions before it, which have been already heard by the Vice-Chancellor, they will, after all, only pass through it in their progress to the Lord Chancellor's Court; for the object of the appellant being to obtain the Lord Chancellor's decision upon this case, he will never rest satisfied with the judgment of a Court of inferior jurisdiction. The suitor has elected his Court by presenting his petition of appeal; and it would be only incurring additional delay, litigation, and expense, if he is to be compelled to submit his case for the judgment of this Court, before he is entitled to that of the Lord Chancellor. It is not contended, that this Court cannot hear a petition which has not already been heard by the Vice-Chancellor; but what we insist upon, is, that such an important right of the subject, as a suitor's right of appeal to the Lord Chancellor, is not taken away, either by the express terms, or by any necessary implication of the recent statute.

Mr. *Twiss* and Mr. *Teed*, in support of the application. One of the propositions contended for on the other side, we do not deny. We admit, that the Chancellor has a certain jurisdiction still in all matters of bankruptcy; but we say, that by the express words of the statute (*a*), this Court has now "superintend-

(*a*) Section 2.

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ence and control" in all such matters, "whether such matters may have arisen in this Court, *or elsewhere*." The simple question, therefore, now to be decided is, whether the matter brought before this Court is, or is not, a matter of *bankruptcy*. For if it be, this Court has power to hear it. And, without going into the question, whether this Court can compel the Lord Chancellor to obey its orders in bankruptcy, it is enough to say, that unless there was an appeal in due form from any of such orders, the Chancellor would feel it incumbent on him, as far as depended upon himself, to give full effect to any such order.

As to the argument founded on the allegation, that the petitioners have elected to go before the Lord Chancellor, we say, that there can be no election, where there is no choice; for when the petition of appeal was presented, the act for the establishment of this Court was not in operation; and therefore we took the only jurisdiction that was open to us. Nor can we be deprived of the relief we seek, by the circumstance of the petition being addressed to the Lord Chancellor, for that is the case with every bill in Chancery, whether the cause is heard by the Master of the Rolls or the Vice-Chancellor. [*Sir A.* Pell. Or suppose the great seal is put in commission, cannot matters previously directed to the Lord Chancellor be heard by the commissioners, without amendment?] Has this Court then the power to hear *us?* For the argument, as to the hardship of preventing the suitor from going before the Court he chooses, does not apply to this case. We are the *actors* here, and have chosen to come before this Court; and we contend that this is, in effect, the same Court as that to which the petition was pre-

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sented; for the petition was presented to the Lord Chancellor sitting *in bankruptcy*, not in the Court of Chancery; and the jurisdiction of the Chancellor in bankruptcy, and that of this Court are now but one. And with respect to any hardship on the respondents, what greater hardship is there, than what occurs in every action and suit, namely, that the plaintiff is always allowed to choose his own Court? Then as to the difficulty urged, of the Chancellor having signed the order on this petition, there can be nothing in that objection; for he has also signed the order of this Court for the removal of all petitions depending before him. But why did not the respondents, if they wished this petition to be heard by the Chancellor, apply to his Lordship for that purpose, and not come before this Court? It is admitted by Mr. *Montagu*, that this Court has, at all events, a *concurrent* jurisdiction with the Chancellor. Now the term *concurrent* means *coextensive*, so that we can in this instance avail ourselves of a result, which they on the other side did not anticipate when they made that admission.

But the jurisdiction, as given to this Court by the late act of parliament, is as large, extensive, and conclusive as it possibly can be. It is not necessary to contend, that this Court has a sole and exclusive jurisdiction in bankruptcy. [*Sir A.* Pell. I am inclined to go further, and hold, that this Court has sole jurisdiction. For, if I have the *controul* over my household, how can any other person be said to controul me in the management of it?] From all the supreme Courts of Westminster Hall, there is an appeal to the House of Lords, but they are not the less *supreme* Courts. The exception in the second section of the

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act of parliament, which gives this Court superintendence and controul in bankruptcy, "except as is herein otherwise provided," is very material. The power given by the 12th section to the Lord Chancellor, to issue a *fiat* in lieu of a commission, is one of the exceptions referred to in the 2d section. But where is a petition of appeal from the Vice-Chancellor to the Lord Chancellor excepted in the act? The general order made by this Court for setting down petitions for hearing before it, which were pending before the Lord Chancellor, is fully warranted from the terms of the 11th section. But it would not have had power to make such order, without the consent of the Lord Chancellor; for though this Court has a coextensive, it has not a paramount jurisdiction. The statute of *53 Geo. 3*, c. *24*, for the appointment of the Vice-Chancellor, contains an express provision in *section 2*, that the Vice-Chancellor shall have no power to discharge, reverse, or alter any decree, order, act, matter, or thing, made or done by the Lord Chancellor, or the Master of the Rolls. Now if it was intended, that this Court should not interfere with any previous order in bankruptcy made by the Vice-Chancellor, why did not the framers of the act for the establishment of this Court introduce into it a similar provision? For nothing would have been easier, than to have said that this Court should not have power to discharge, reverse, or alter any order made by the Vice-Chancellor.

Erskine, C. J.—This is a motion to discharge an order obtained by the petitioners for setting down a petition for hearing before this Court, which had been presented to and answered by the Lord Chancellor. I

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am of opinion, that the order ought to be discharged, but not for the reasons contended for by the counsel opposing the order. The ground on which I found my opinion is, that the petition cannot be heard in the *form* in which it is now set down, and that we have no authority to proceed on a petition addressed as this is to the Lord Chancellor. It has been reported to have been the opinion of the Vice-Chancellor, that his jurisdiction in bankruptcy still exists. It has been also intimated to us, on the other hand, that the Lord Chancellor believes his jurisdiction, as far as the hearing of the present petition goes, to have wholly ceased. In pronouncing our judgment, I think we should not be swayed by either of these authorities, or by any other opinions that may be expressed elsewhere as to the powers of this Court. Neither do I think, that our judgment ought to be affected by what is called the hardship of depriving a man of his right to choose the Court, in which he wishes to have his cause decided; nor by the motives of the appellant in this case for transferring this petition before us. The object of the original petition is to supersede the commission, and to compel the assignees to pay interest for monies retained in their hands under the 104th sect. of the 6th *Geo.* 4, c. 16. Now, I am of opinion, that the subject-matter of this petition is clearly within the jurisdiction of this Court, under the words of the 2nd sect. of the 1 & 2 *Will.* 4, c. 56. These words give authority to the Court to hear all such matters in bankruptcy, as now usually are, or lawfully may be, brought before the Lord Chancellor. Is this petition, then, a matter in bankruptcy, which is usually, or lawfully may be, brought before the Lord Chancellor? The answer is,

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it has been, and it ought to have been, brought before the Lord Chancellor. But it is said, we have no jurisdiction to hear an appeal from the Vice-Chancellor. Does not the act of the 53 *Geo.* 3, c. 24, subject the orders of the Vice-Chancellor in bankruptcy to an appeal to the Lord Chancellor? If then, the Lord Chancellor might entertain this petition, it is clear to me that this Court can, under the words of the 1 & 2 *Will.* 4, c. 56, s. 2. And I think, that if a petition were presented to this Court to discharge an order of the Vice-Chancellor in bankruptcy, this Court could entertain it, subject to the right of future appeal to the Lord Chancellor.

But, though I have no doubt of the jurisdiction of this Court in the present instance; yet another important question arises for our decision on this motion, namely, whether the subject-matter of this petition has been so legally brought before the Court, as to enable our jurisdiction to attach. Here, no petition has been presented to *this Court*. The whole of this discussion has arisen on a motion to transfer the petition to this Court, which motion in no way refers to the subject-matter of the petition. The words in the 3d section of the act for establishing this Court are, " that all such matters, &c. shall be brought on by way of petition, motion, or special case;" which evidently mean by *petition* to this Court, and not by *motion to hear* the subject of a petition presented to another Court. When application was first made to us to hear the petition in this Court, we were of opinion that we could not entertain it. On its being afterwards mentioned, however, to the Lord Chancellor, he thought his jurisdiction extinct. Without going into that question, it is enough for us to be satisfied that we have at least a concurrent

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jurisdiction. The parties might have wished to have had the petition brought on, but there seemed no manner of doing so; because the same rules were to be observed, with respect to the addressing petitions to this Court, as had been the practice before the act on petitions to the Lord Chancellor. This Court, therefore, to relieve parties from the expense and delay consequent upon filing fresh petitions, made, with the approval of the Lord Chancellor, the order of the 16th January, that petitions *might* be set down for hearing in this Court, that is, if all parties would consent to waive the objection to the formal address of their respective petitions. In this case, however, an objection is made to the jurisdiction, and, therefore, the question arises, whether we can hear this petition *in invitum*. I think we cannot. For the words of the act do not say, that all proceedings shall be transferred, but merely that all matters may be heard in this Court; and they must be heard in the same form as heretofore, viz. *on petition to the Court that is to hear them*. If the act had intended that all proceedings should be at once transferred to this Court, the same words would have been used as in the 11 *Geo.* 4, & 1 *Will.* 4, c. 70, s. 14, the act for abolishing the Welsh Judicature; which directs the transfer of all proceedings that were then pending in the Courts abolished. As, therefore, this formal objection has been taken, I think we cannot insist on the objecting party coming here, except on a petition addressed in form to this Court. But I must beg to add, that entertaining, as I do, no doubt of our jurisdiction, on a petition properly presented to this Court, the objection taken will only entail on the parties an idle expense, and waste both of time and money.

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However, as the objection is insisted on, the order of the 24th January, obtained by Mr. Twiss, must be discharged, but without costs.

Sir A. Pell.—I cannot but regret, that the peculiar form, in which this matter is brought before the Court, prevents our coming to any direct decision upon it. I fully concur in the opinion formed by his Honor the Chief Justice, as to our jurisdiction, of which I have never entertained one moment's doubt, if the matter had been properly brought before the Court.

It is enough for us in this case to argue, that our jurisdiction is concurrent with that of the Lord Chancellor in bankruptcy. I say nothing, as to the opinion of that Judge, that his powers are extinct. I think it, however, a duty we owe to the legislature and the public, to allude shortly to the authority under which we are now sitting here. I shall first refer to the preamble of the act constituting this Court; for though the preamble does not controul an act of parliament, it is nevertheless a key to understand it. Now, the preamble in this case refers to providing *other* means of administering and distributing the effects of bankrupts, than what were acted upon before. It then makes this a Court of original jurisdiction, and the 2d section gives to the Court *superintendence and controul* in all matters of bankruptcy, with power and authority "to hear and determine, order, and allow all such matters in bankruptcy as now usually are, or lawfully may be, brought by petition, or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy, *or elsewhere*." We have been rather pressed with the argument drawn from the 39th section

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of the act, by which the authority of the former commissioners was determined, and from which it was contended that, as the authority of the commissioners was taken away by express terms, so the jurisdiction of the Lord Chancellor, if intended to be abolished, would have been also taken away by express enactment. But the counsel for the respondents have not referred to the 16th section (*a*), perhaps because they could not grapple with it. The effect of this clause appears to me to do every thing, generally, in regard to the determination of the former jurisdiction in bankruptcy, which the 39th section professes to do, specifically, with respect to the commissioners. The question is, therefore, whether that which has been done in part elsewhere can be finished here,—whether matters in *fieri* before the Courts of former jurisdiction can be proceeded with and adjudicated upon by this Court; for if not, the expense and delay of enforcing the rights of bankrupts and their creditors, which it was the object of the statute to remedy, would still arise in every proceeding in bankruptcy which was undetermined at the time of the passing of the act.

Sir J. Cross.—As the question of the jurisdiction of this Court has been brought forward, it is necessary for us to see how that question has arisen. Before the late act of 1 & 2 *Will.* 4, c. 56, came into operation, there were, under the old system of administering the law in bankruptcy, many petitions pending before the Lord Chancellor to be heard on the 9th of January last. But owing to the length of time occupied on some of them, many were obliged to stand over for a

(*a*) See *ante*, p. vi.

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future day, among which was the present petition; meanwhile, and before they could be heard, the new act, establishing an entirely new jurisdiction in bankruptcy, came into operation on the 11th of January. On a subsequent application to the Lord Chancellor to hear this petition, his Lordship intimates that he has no longer power to do so. The parties are, therefore, at a loss, as to what course they ought to pursue. Now it is well known, that the recent act was passed for the exoneration of the Lord Chancellor, by the establishment of this Court. For upwards of a century his business in bankruptcy had been extending, and the pressure of matter becoming greater and greater every day, it was time that the Court of Chancery should be relieved from the burthen of bankruptcy proceedings. Under the impression that his jurisdiction had ceased by the new act, and acting in the true spirit of it, with a view to prevent delay and expense to all parties, he suggests the course of transferring all petitions at once, in the state they then stood, to be heard in this Court. This Court has met such intention of the Lord Chancellor, and issues, with his Lordship's approval, the order of the 16th January, 1831. The petitioner applies to set down his petition here; but the respondent objects to be brought here *in invitum*, and contends that this Court has no jurisdiction to entertain this petition, but that the Lord Chancellor alone has such power. The only tenable ground of objection to this Court exercising the jurisdiction, is, that the matter is attempted to be brought on here, not by way of a petition to this Court, but by a petition addressed to the Lord Chancellor. As to the jurisdiction of this Court, if this objection of form were put aside, I have no doubt. The Vice-Chancellor's

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Act, 53 *Geo.* 3, c. 24, provides, in effect, that that Judge is to act as deputy to the Lord Chancellor for a certain portion of his duty. Now the Lord Chancellor has power by that act to rehear the Vice-Chancellor's orders, &c.: and by the 2d section of the new act, this Court may hear and determine all matters which the Lord Chancellor before the act had power to do; therefore it is manifest, that this Court may also rehear the orders of the Vice-Chancellor in bankruptcy.

The question then resolves itself into a mere matter of form. It certainly strikes me as being a very frivolous proceeding on the part of the respondents, if they insist on a new petition being presented addressed to this Court, for what other consequence will ensue, except that of causing both great delay and great expense? As, however, the objection has been taken, it is safer for the petitioner at once to adopt the only course he can pursue, viz. that of presenting *to this Court* a new petition. But I very much question, if he is not already *rectus in Curiâ*. The third section of the act directs all matters to be brought on, "according to rules and regulations to be established, &c." This Court makes the General Order of the 16th January, for transferring petitions; and I am strongly inclined to think that the Court might entertain the matter on the petition in its present form, without the necessity of a new petition. However, as this is a question of mere temporary importance, applying as it does only to matters now pending before the Lord Chancellor, I should suggest, in concurrence with the judgment of the two learned Judges who have preceded me, that the petitioner had better at once remould his

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present petition by addressing it to this Court, and thereby set the question at rest.

Sir G. Rose.—The question, that has been raised in this case for our determination, appears to me to be one of obvious solution, notwithstanding we are still in the infancy of our jurisdiction. But it is not necessary for us to go into the question of jurisdiction, though I have a strong opinion on the subject. All the old petitions being addressed to the Lord Chancellor, and he having directed the attendance of the parties before him, this Court thought, as a matter of curtesy, it would be proper that the Lord Chancellor should first dispense with such attendance. That he has already done, and the General Order of the 16th January was accordingly issued. Had the parties on both sides been willing, that this petition, in its present form as addressed to the Lord Chancellor, should be heard by this Court, no question could have arisen. But, the respondents in this petition taking that objection, how are we to act? Would any contumacy have arisen, had they chosen not to attend? I apprehend none. Had this Court pronounced a final decision on this petition, how could its order have been enforced? An incorrectness would have been visible on the face of the proceedings, which would have purged all contempt. As to the question of our jurisdiction, had there been no objection raised of this formal nature, I cannot entertain a difficulty, that this Court has power to hear and determine all matters in bankruptcy, which the Lord Chancellor might formerly have heard and determined. This Court would have authority to make orders in all those matters referred to in Mr. *Jacob's* argument. And

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though it is very true, that this Court could not order the Lord Chancellor to do the final act in those cases, by affixing the great seal, yet it is perfectly clear, that the Lord Chancellor would do so, unless he were stayed by the appeal of one party or the other from the order of this Court. Put the case of an injunction ordered by the Vice-Chancellor, does not the Lord Chancellor without hesitation always affix the great seal thereto, unless an appeal intervenes? And was it ever doubted, that the jurisdiction of the Lord Chancellor was impeached, because the Vice-Chancellor directed a supersedeas or injunction? I think, therefore, that there is no objection to the jurisdiction of this Court in the present petition, except the one of form. That I think may now be got over by the petitioner giving notice to the other party, of a motion to this Court for leave to transfer his petition, embodying in such motion the objects of the petition.

Mr. *Jacob*, on the part of the respondent, then waived the objection as to the form of the petition; which was, therefore, ordered to be transferred for hearing by this Court, the question as to the costs of this application being reserved.

Ex parte WILLIAM COLES the younger, in the matter of DANIEL HENRY RUCKER, JOHN ANTHONY RUCKER, and HENRY JOHN RUCKER.

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January 31.

The want of registration of a conveyance invalidates the deed as to subsequent purchasers only, not as to assignees of the party conveying the property.

THE petition stated, that by indenture dated July 14, 1818, between *A. Newbiggin*, merchant, of the first part; *J. Macgoun*, *D. Macgoun*, *J. Watson*, and *J. Gairdener*, merchants, of the second part; *J. M'K. Campbell*, of the third part; *H. Dewar*, *P. Campbell*, *J. Macgoun*, and *D. Macgoun*, of the fourth part; and *J. A. Rucker* and *H. J. Rucker*, of the fifth part; in consideration of 12,000*l.* by the said *J. A. Rucker* and *H. J. Rucker* paid to the said *J. M'K. Campbell*, *H. Dewar*, *P. Campbell*, *J. Macgoun*, and *D. Macgoun*, certain property, situate in the island of Tobago, was assigned to the said *J. A. Rucker* and *H. J. Rucker*, by way of mortgage, subject to redemption on payment of 14,000*l.* on the 14th July then next. That prior to the issuing of the commission of bankruptcy against the *Ruckers*, the petitioner, on the 28th September, 1831, accepted for their accommodation two bills of exchange for 2500*l.* each, one dated 23d August, 1831, at 70 days' sight, and the other the 23d September, 1831, at 70 days' sight. That in consideration thereof the *Ruckers* deposited the said mortgage with the petitioner, by way of pledge or security for the punctual payment by them of the said bills of exchange when the same should become due, accompanied with a written document, undertaking to place a sufficient sum of money in his hands for that purpose. That the said written document was duly proved under the city seal, and forwarded to the said island of Tobago to be recorded. That the said commission of bankruptcy

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against the *Ruckers* issued on the 17th November, 1831, and that *J. W. Borradaile* and *J. Edlman* were chosen assignees. That the said bills of exchange became due on the 4th of November and 5th of December, 1831, and no cash having been placed in the petitioners' hands, they were still unpaid. That 4637*l.*15*s.*9*d.* was due on account of the said mortgage, but that, in consequence of no legal assignment of the same having been made to the petitioner, he was unable to take proceedings at law for the recovery of the same.

The petition therefore prayed, that the said *J. W. Borradaile* and *J. Edlman*, as such assignees of the estate and effects of the said bankrupts, might be directed to take all such proceedings as might be necessary and proper for enforcing the payment of the said sum secured, under or by virtue of, or remaining due upon, the said mortgage security, or for foreclosing or bringing to sale the said property charged therewith; and that the said assignees might be further directed to pay and apply the proceeds so to be received or to arise therefrom, in and towards satisfaction and payment of the said drafts or bills of exchange.

Mr. *Turner*, for the petitioner, relied on the cases of *Jones* v. *Gibbon* (*a*), and *Matthew* v. *Wallwyn* (*b*).

Mr. *Wigram*, on the behalf of the assignees, contended, that if the order were made in any shape upon this petition, it could not be according to the form as prayed, but could only direct that the petitioner should be at liberty to use the names of the assignees, he indemnifying them, and undertaking to secure the due

(*a*) 9 Ves. 407. (*b*) 4 Ves. 118.

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payment of the bills of exchange. But this was a mere equitable assignment of a mortgage, by which the assignees were not bound, inasmuch as there was no sufficient registration under the 21 *Jac.* 1, c. 19; neither had the forms of registration required by the Act of Assembly (*a*) of the island of Tobago been complied with. That act required, in the first section, that all deeds, &c. shall be duly entered and recorded in the register's office of the said island, within fifteen months after the making of the same, otherwise they shall be utterly void, and not pleadable in any Courts in the said island, or elsewhere. The second section provides, that if such deed be executed in Great Britain, the same shall be acknowledged before the chief magistrate of any city or town corporate in Great Britain, and transmitted to the said island of Tobago under the seal of the said corporation. These forms not having been complied with, the assignment was utterly void against the assignees, the property still remaining in the order and disposition of the bankrupt. And as no notice of the assignment had been given to the mortgagor, prior to the act of bankruptcy by the *Ruckers*, the assignment was on that ground also invalid. In *Jones* v. *Gibbon*, the mortgagor had become bankrupt; in this case it was the mortgagee who was the bankrupt, which made a considerable difference between that case and this.

Mr. *Turner* in reply contended, that the mere deposit of the deeds, without a word passing, was quite sufficient to render the assignment available, without

(*a*) 8 *Geo.* 3. See 1 Howard's Colonial Laws, 296, explained and amended by 13 *Geo.* 3. How. Col. L. 301, 2.

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notice; and the deposit here was made some time before the bankruptcy; *Ex parte Langston* (*a*). In respect to the variance pointed out between *Jones v. Gibbon* and the present case, that case, in all its circumstances, tallied with the present; where it was held, that such notice was not necessary. The Register Act was made for the protection of subsequent purchasers; and the effect of it is not to vitiate a deed for want of registration, as between those claiming under the conveyance, and the assignees of the party conveying the property. For with respect to the bankrupt, and those claiming under him, no objection can be taken as to the want of registration. Thus, in *Hodson* v. *Sharpe* (*b*) it was held, that a lessee could not object to an action by his landlord for breach of covenant, that the lease was void by the 15 *Car. 2*, c. 17, for want of registration; such act not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrances duly registered. The Act of Assembly of the island of Tobago, 8 *Geo. 3*, had also been amended and explained by the 13 *Geo. 3* (*c*), which expressly provided that such unregistered deeds should only be void as against subsequent purchasers duly registering, without notice. The assignees of a bankrupt stand in the same equity only as the bankrupt himself. As, therefore, the bankrupt could not object to the non-registration, so neither could his assignees.

The Court accordingly ordered, that the petitioner should be at liberty to use the names of the assignees to get in the monies due on the original mortgage, and

(*a*) 17 Ves. 230. (*b*) 10 East, 350. (*c*) How. Col. L. 301, 302.

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that the assignees should do all necessary acts for that purpose; the petitioner indemnifying them, and undertaking to apply the monies got in to the payment of the two bills of exchange, and to account to the assignees for the surplus.

Ex parte John Thomas Pocock, in the matter of Richard Chapman.

January 31.

The Court will not order the bargain and sale from the commissioners to the assignees to be given by them to a purchaser, upon his allegation, merely, that the bankrupt had no other freehold property than what was conveyed to the purchaser under the commission.

THIS petition prayed, that the petitioner, as the purchaser of certain closes of land in the return mentioned, might be declared to be entitled to the possession or custody of the indenture of bargain and sale from the commissioners to the assignees of the 28th December, 1830, and that the assignees might be ordered to give up the same to the petitioner; the petitioner offering to enter into such undertaking for the production thereof, as to the Court should seem meet. And if the Court were of opinion he was not entitled thereto, then that the said indenture might be entered of record pursuant to the provision contained in the 6 *Geo.* 4, c. 16, s. 96. The facts stated in the petition were, that by indentures of the 26th and 27th June, 1826, made between *John Webb*, *James Blunt*, *John Mills Jackson*, and *Dorothy* his wife, and *Ann Little*, of the first part; *Robert Henry Jones*, of the second part; the petitioner, *John Thomas Pocock*, of the third part; *Edward Gyles*, of the fourth part; the bankrupt, *Richard Chapman*, of the fifth part; and the Reverend *Walter Blunt*, of the sixth part; and by a fine levied by the said *J. M. Jackson* and *Dorothy* his wife, certain freehold lands at Islington, in the county of Middlesex, were appointed, granted, released, and assured, unto

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and to the use of the said *Walter Blunt*, subject to redemption if the said *Richard Chapman* and the petitioner, or either of them, should pay unto the said *Walter Blunt*, his executors, &c. the sum of 4000*l.* with interest at 5 per cent. at the times therein mentioned and since past. And if the said *Richard Chapman* should pay unto the petitioner the like sum of 4000*l.* and interest, at the times therein mentioned and since past, then the said *Walter Blunt* would convey and assure the said premises unto the said *Richard Chapman*, his heirs, &c. And it was thereby declared and agreed, that the said *Walter Blunt*, in case default should be made in payment of the said principal sums of money and interest, should sell and dispose of the said premises, and out of the proceeds pay, in the first place, all the costs and expenses of the trusts, and then the said sum of 4000*l.* and interest to the said *Walter Blunt*, and then the said sum of 4000*l.* and interest to the petitioner, and the surplus to the said *Richard Chapman*. That default was made in payment of the said principal sums of money. That a commission of bankrupt issued on the 18th December, 1830, against the said *Richard Chapman*, and he had been thereunder duly found and declared a bankrupt, and *James Gough* and *John Townsend* had been chosen assignees of his estate and effects. That by an indenture of bargain and sale, bearing date the 28th of December, 1830, between the commissioners in the said commission named, of the one part, and the said assignees of the other part, and afterwards enrolled in the Court of Chancery, the said premises at Islington, and all other the freehold messuages, lands, tenements, and hereditaments, whereof, wherein, or whereunto the said *Richard Chapman*, at the time he became a bank-

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rupt, or at any time since, had any estate, right, title, or interest, were conveyed to the said assignees (subject to all incumbrances thereon) in trust for the creditors of the said bankrupt seeking relief under the said commission. That at the date of the said commission, there was and still is due to the said *Walter Blunt*, by virtue of the said indenture of mortgage, the principal sum of 4000*l.* with interest, and to the petitioner the like sum of 4000*l.* with interest. That the major part of the said commissioners, on or about the 8th July, 1831, on the application of the petitioner, directed a sale by auction to be made of the aforesaid premises, subject and without prejudice to the prior incumbrance of the said *W. Blunt;* and ordered that the produce of the said sale should, in the first place, be applied in discharge of the expenses of such sale, and afterwards in or towards payment to the petitioner of his said mortgage debt and interest; and that if there were any surplus it should be paid to the assignees, with liberty for the petitioner to prove the deficiency under the said commission. That the petitioner subsequently applied for, and obtained, an order for leave to bid at the sale. That the said premises were accordingly put up to sale, and the petitioner was declared the purchaser at the sum of 1470*l.* That the petitioner had waived his costs of, and occasioned by, his application for the sale, and for leave to bid; and was willing to pay out of his own monies the costs of the said assignees occasioned thereby, and had also waived any allowance in respect thereof out of the said purchase money. That the assignees were willing to execute a conveyance to the petitioner of the said premises, subject to the said mortgage to the said *W. Blunt* and interest thereon;

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and the petitioner was willing also to execute the same, and to accept and retain the said sum of 1470*l.* in part discharge of the said principal sum of 4000*l.* and interest, due and owing to the petitioner by virtue of the said mortgage security, on having the said indenture of bargain and sale given up to him; but that the said assignees alleged, that inasmuch as the said bankrupt had absconded, and had not passed his final examination, it might appear that there were other freehold estates of the bankrupt besides those purchased by the petitioner, and they refused to deliver up the said indenture of bargain and sale to the petitioner, and would only enter into a covenant for the production thereof, whilst they should continue to be assignees of the bankrupt's estate and effects. That the assignees could not point out any other freehold estate which belonged to the bankrupt, and that the petitioner was informed by the said bankrupt, and after diligent enquiry firmly believed, that the bankrupt had not at the time of his bankruptcy, nor had he since any freehold estates whatsoever, except the aforesaid premises purchased by the petitioner. That the petitioner intended to sell the said premises purchased by him as aforesaid in lots for building ground or otherwise, as he might have opportunity to do, and that it would be a great injury to the petitioner if any impediment should arise in making out a marketable title thereto, by reason of the loss of the said indenture of bargain and sale.

Mr. *Geldart* appeared in support of the petition. If the bankrupt in this case had passed his final examination, then the petitioner would be clearly entitled to have the first part of the prayer of the petition granted.

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But as the bankrupt has absconded without giving any information about his property to his assignees, and there is no information to be gathered from any authorities on the subject, it is admitted that the question is one of some doubt. In this case, however, there is no reason to suppose the bankrupt had any other real estate, or, at all events, any of as great value as that purchased by the petitioner. And if at any subsequent period there should appear to be an estate of less value, yet still the petitioner, as the purchaser of the first and largest estate sold, would be entitled to the indenture of bargain and sale, which forms, in fact, part of the muniments of the estate, and the retention of which could be of no possible use to the assignees. If in such case any other real property had come to the bankrupt after his bankruptcy, formerly there must have been a fresh bargain and sale. But the 25th and 26th sections of the late act of 1 & 2 *Will.* 4, c. 56, now vest the estate of the bankrupt in the assignees, by virtue of their appointment, without any deed of conveyance for that purpose; and therefore a conveyance to them by bargain and sale, or by any other deed, is now wholly useless. These clauses, also, have a retrospective effect, and relate to the commissions existing at the time of passing the act, as well as to *fiats* issued since. [*Sir J. Cross.* Do you contend, that the 26th section extends to bargains and sales already made under former commissions?] I should submit, if any property comes now to a bankrupt under any such commission, it would vest without any new bargain and sale. The words of the section are, "such *present* and future real estate of such bankrupt." The word "*present*," therefore, applies to property which

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already belongs to the bankrupt, and to which, I contend, the assignees might make a good title, without any bargain and sale. Great injury would arise to the petitioner, unless the assignees were ordered to give up the deed to him. For the sole object of the purchase by the petitioner was, to resell or let the land for the purposes of building, in several lots; and he could not make out his title, without the indenture of bargain and sale, for a mere copy of inrolment of the deed could not be used as evidence.

Erskine, C. J.—I think the first part of the prayer of this petition cannot be granted. For, whatever might have been our decision, if the bankrupt had passed his last examination, I am of opinion that we cannot now interfere, in the absence of the bankrupt, and in the absence too of all information given by him to the assignees, as to the nature and extent of his property. It is impossible for the assignees to say what will, or will not, be the effect of the bargain and sale; nor should I feel inclined, under these circumstances, even if we had the power, to take from them any part of the proceedings under the commission. With respect to the second part of the prayer of the petition, if the petitioner chooses to take an order, that the bargain and sale may be entered of record in the Bankrupt Office, he may do so upon payment of costs.

Sir A. Pell.—I am of the same opinion. Such a thing has never been done, to my knowledge, as to take a title-deed out of the possession of the assignees, because another party says it can be of no further use to them.

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Sir J. Cross.—We are urged to grant this very unprecedented application, on a mere speculative opinion of the petitioner, that the bankrupt possessed no other real estate than what the petitioner became the purchaser of.

Sir G. Rose concurred.

Ex parte Farmer, in the matter of Statham.

January 31.

The Court will not order resolutions passed at a meeting of creditors to be carried into effect, without referring it to the commissioners to certify whether it would be for the benefit of the estate.

Mr. *MONTAGU* appeared in support of this petition, which prayed that certain resolutions agreed to at a meeting of the creditors as to the sale of some estates belonging to the bankrupt, might be adopted and confirmed by the Court, in order that the same might be carried into effect. The only doubt was, whether the Court could interfere, without a reference to the commissioners.

The Court suggested, that as it did not appear, that the consent of *all* the creditors had been obtained, the proper course would be, to refer it to the commissioners to certify, whether it would be for the benefit of the bankrupt's estate, that such resolutions should be carried into effect; which was ordered accordingly.

Ex parte Donaldson, in the matter of Sinclair Wright.

Same day.

Order made to divide unclaimed dividends among the other creditors.

Mr. *BICHNER* stated, that this was a petition on the behalf of the assignees, under the 110th section of

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Ex parte DONALDSON.

the 6 *Geo.* 4, c. 16, praying that certain unclaimed dividends might be divided among the other creditors of the bankrupt. The dividends were declared so far back as the year 1820, and were still remaining unpaid.

The Court made the order, on being informed that the proper certificate had been filed in the office of the Secretary of Bankrupts, pursuant to the requisitions of the above section of the Bankrupt Act.

Ex parte DOWTON and EARLE, in the matter of WISDEN.

January 31.

When the time has expired for opening a fiat, the Court will not grant further time for this purpose to the *petitioning creditor*, merely because he has been negotiating for a composition with the general body of the creditors.

MR. *SWANSTON* applied in this petition, which was on behalf of the petitioning creditor, for fourteen days further time to open a *fiat*. The ground of the application was, that a proposition had been made by a creditor resident at Brighton, for the liquidation of the bankrupt's debts, which suspended the proceedings; and since the issuing of the *fiat*, negotiations had still been going on, with a view to the bankrupt entering into a composition with his creditors, and for the purpose of annulling the *fiat*. These negotiations had now failed; and as the time for opening the *fiat* expired to-morrow, the petitioning creditor was not prepared with sufficient evidence of the trading and act of bankruptcy, having been misled by a negotiation as to an arrangement, which he had reason to suppose would be for the benefit of all the creditors.

The Court however said, they could not sanction the taking out a *fiat*, with a view to effect an arrange-

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ment with the creditors. The petitioning creditor ought to be prepared to open the *fiat* at the proper period for so doing. If any impediment had been purposely thrown in his way by any other creditor, or by the bankrupt, then the Court might have assisted him. And *Rose*, J. said, that though the Court might be induced from circumstances to delay the opening of a commission at the instance of a bankrupt yet in his experience he never knew it to be done at the instance of a petitioning creditor; and that the latter ought not to avail himself of so severe a process as a commission, for the purpose of compelling an arrangement with the creditors.

Petition dismissed.

Council Room, Lincoln's Inn, 9th February.

Where a creditor alleges there has been a fraudulent preference, the Court will, on his petition, send the case for inquiry before the commissioners, the creditor undertaking to pay the costs of such inquiry.

Ex parte BILLING, in the matter of LUCAS.

THIS was the petition of a creditor, praying that the Court would refer it to the commissioners to examine into the validity of a warrant of attorney, which had been given by the bankrupt to the petitioning creditor, upon which the latter had entered up judgment and taken out execution, and had levied 500*l.* in part of the sum for which the warrant of attorney was given. The petition alleged that a Mr. *J. Husband* was the solicitor for the bankrupt, as well as for the petitioning creditor, and for the assignee; that *Joseph Malachi*, the assignee, refused to make any investigation into the circumstances under which the warrant of attorney was given, although the petitioner had offered to pay the expenses of a meeting of the commissioners for that purpose; that *Malachi* was not a creditor of the bankrupt, but that he was appointed assignee solely under the influence of

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Husband; that the petitioner had applied to the commissioners to institute an inquiry into the transaction, but they declined to do so, unless the assignee himself applied for such inquiry.

Mr. *Swanston*, in support of the petition, contended that assignees of a bankrupt ought never to refuse to call a meeting of the commissioners, for the purpose of investigating any matter relating to the bankrupt's estate, when the creditor offers to indemnify the estate against the expenses of such inquiry.

Mr. *Montagu* and Mr. *Jacob*, for the assignee, opposed the application, on two grounds, 1. That the assignee had good reasons for refusing to make the proposed inquiry; and 2. That the petitioner did not engage unconditionally to indemnify the assignee from the expenses of such inquiry, but only in the event of there not being sufficient assets for that purpose. On the first point they urged, that nothing was more important to the interests of the bankrupt's estate than to prevent parties from looking at the bankrupt's books, unless there is a real necessity for inspecting them. There was no prospect of good in this attendant upon the inquiry, but on the contrary, of serious evil; for the assignee is endeavouring to effect a compromise with the creditor under the warrant of attorney, and make most excellent terms for the general creditors of the bankrupt, and the whole of this negotiation will be defeated, if the prayer of this petition is granted. The petitioner was not actuated by a good motive in presenting this petition, for his real object was not to examine into the validity of this warrant of attorney for

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the benefit of the bankrupt's estate, but for the purpose of enabling *Elworthy*, the solicitor for the petitioner, to make discoveries, that may assist him on the trial of an action set down for the 2d February, in which the assignee is subpœnaed, and in which action *Elworthy* is attorney for the defendant. When a petition therefore is presented for an indirect object, not avowed, but not denied, the Court ought not to encourage the application. The petitioner here is only a creditor for 20*l*., and he is a mere tool in the hands of the solicitor, in aid of the defendant in the action at law. And the case of *Stockfleth* v. *De Tastet*, 4 Camp. 10, is an authority for the Court discountenancing any improper examination of a party before commissioners of bankrupt, upon a subject unconnected with the interests of the bankrupt's estate, and with a view to procure evidence in a pending action.

2. The assignee swears, that he would have called a meeting of the commissioners, if the petitioner had proposed positively to pay the expenses of it; but that the proposal was only conditional, namely, to pay the expenses, if there were not sufficient assets of the estate.

With respect to the allegation in the petition, that the assignee is not a creditor of the bankrupt, an assignee is always the more efficacious where he is not one, and of this opinion also seem the legislature, from the provision that has been made in the late act of parliament as to the appointment of official assignees. And as to the assignee acting under the influence of *Husband*, the assignee has sworn that he is under no such control, nor is *Husband* his personal friend. The petitioner states, that he made an application to the commissioners to institute this inquiry on the 27th September,

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when they declined to do so, and it was not till the 17th January that he presents this petition. Why does he wait so long if his real object was to benefit the estate? Upon these grounds they contended, that the petition ought to be dismissed with costs.

ERSKINE, C. J.—It is not necessary in this case to go into the argument founded on the counter-statements in the different affidavits. The Court is anxious not to vary from the ordinary course of proceeding. The petitioner here applies to call a meeting of the commissioners, offering to pay the costs of such meeting. It appears to me, therefore, that the usual order must be made, namely, that a meeting of the commissioners shall be held for the purpose of instituting the inquiry sought for by the petitioner, he paying the costs of the meeting.

Sir A. PELL.—It is not the first time since I have sat in this Court that I have been doomed to hear the wholly conflicting statements of the affidavits of the different parties to a petition, and a great deal of unnecessary statement as to the real point to be decided. I do not know whether it may not be necessary, eventually, to inquire into Mr. *Elworthy*'s conduct in this transaction. But the commissioners will make their report upon the result of this inquiry, and when they make their report, we shall be able to award the costs.

Sir J. CROSS.—The petitioning creditor in this case having swept away all the bankrupt's effects under the warrant of attorney,—at least, so the petitioner alleges,—he appoints the assignee, who is a creditor for the small

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sum of 20*l.* I can only say, that if the commissioners have refused to inquire into this transaction, they have neglected their duty, and that the case appears to me to call for further investigation.

Sir G. Rose.—I think this application is quite a matter of course. This is a case, where the petitioner says there has been a fraudulent preference. It has always been the practice to send such a matter for inquiry, and I think, if what Mr. *Swanston*'s client alleges is true, he would have good grounds for applying to remove the assignee. An assignee is not to blame in requiring the sanction of this Court, before he institutes an inquiry which may be attended with expense. But when he opposes a claim for investigation, which may in its result increase the funds of the estate, then it would not be just to the creditors to withhold its sanction to such inquiry. We therefore give the petitioner leave to use the name of the assignee in calling a meeting of the commissioners, for the purpose of inquiring into the validity of this warrant of attorney; the petitioner undertaking to indemnify the assignee against the expenses of that proceeding. And with respect to the costs of this application, I conceive we best protect the interests of a bankrupt's estate, when there is extraneous matter introduced into an application of this nature, to take care that assignees shall not be saddled with the costs.

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Ex parte HOOPER, in the matter of HOOPER.

9th February.

A bankrupt cannot petition to supersede a commission on the ground of the insufficiency of the petitioning creditor's debt, when he has lain by two years, without adopting any proceeding for that purpose.

A petition is not necessarily dismissed with costs, because a previous petition for the same object has been also dismissed, if the dismissal of the prior petition was on a mere matter of form.

THIS was a petition from the bankrupt, a poor and illiterate person, to supersede a commission issued against him in the year 1829, by Mr. *Coates*, an attorney at Leominster, on the ground of the insufficiency of the petitioning creditor's debt. This amounted to the sum of 136*l.* 10*s.* 2*d.*, which was composed of no less than 22 bills of costs for different proceedings instituted by Mr. *Coates*, as the bankrupt's attorney; but these bills having lately been taxed, the amount was reduced to the sum of 77*l.* 7*s.* 4*d.* Before the last meeting, however, Mr. *Coates* had increased his bill of costs to 146*l.* And it was stated, that Mr. *Coates* having at various times obtained from the bankrupt all the money he could, he issued this commission as petitioning creditor, chose himself sole assignee, appointed himself solicitor to the commission, and was the sole creditor of the bankrupt, with the exception of the bankrupt's son, who had also a claim against him for 50*l.* Since the issuing of the commission, the bankrupt had presented two former petitions to get it superseded; but they were dismissed on a matter of form, because the affidavits were filed before the petitions.

Mr. *Twiss* and Mr. *Stinton* for the petitioner. It could not be contended, that the petitioning creditor in this case was bound to tax his bill before he swore to the debt, because the contrary has been established (*a*). But as it had been since reduced below 100*l.*, this was a good ground for applying for a supersedeas. And

(*a*) See *Ex parte Howell*, 1 Rose, 312; *Ex parte Steele*, 16 Ves. 166.

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though it appeared, that the petitioning creditor had subsequently proved other debts under the commission, amounting in the whole to 335*l.*, yet it was not permitted to the petitioning creditor, to substitute a different debt from that on which he took out a commission.

The Court however were of opinion, that as the bankrupt had lain by so long, before he ascertained the real amount of the debt by taxation, which he might so readily have done, he was not now, after the lapse of more than two years, entitled to petition to supersede.

Mr. *Montagu* and Mr. *Jacob*, for the petitioning creditor, then applied, that the petition might be dismissed with costs, as he had presented two petitions before for the same purpose, which had been both dismissed.

But the Court said, that as the former petitions had been dismissed not on the merits, but on mere matters of form, they thought the petitioner ought not to pay the costs.

Petition dismissed, but without costs.

Ex parte Brown and another.

9th February.

One of three executors becoming bankrupt, the two others may prove against his estate.

THE bankrupt in this case was one of three executors, and had before his bankruptcy received a considerable amount of the assets belonging to the estate of his testator. The petitioners were his two co-executors,

and applied now for an order to be permitted to prove the amount under the commission; which was

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Ordered accordingly.

Mr. *Stinton* for the petitioners.

Ex parte Robinson, in the matter of Evans.

February 9.

Where deeds relating to freehold and leasehold property were deposited with an equitable mortgagee, but the memorandum accompanying the deposit merely related to the *leasehold* property: Held, that the mortgagee might nevertheless pray a sale of the *freehold*, as well as the leasehold property, subject, however, to the payment of the costs of the sale.

THIS was the petition of an equitable mortgagee, for an order for a sale, and for liberty to bid. It appeared, that the deeds deposited with the petitioner related to freehold, as well as leasehold, property of the bankrupt, and that the consideration for the deposit was, the petitioner accepting several bills of exchange for the bankrupt; but the written memorandum accompanying the deposit was confined to the leasehold property. The clerk of the petitioner, however, who received the deeds from the bankrupt, swore that nothing was said by the bankrupt on that occasion, from which his intention might be collected that the lien was to attach on one deed more than another, and that the clerk did not, in fact, know to what property the deeds related.

Mr. *Wigram*, for the assignees, contended, that as the petitioner took a writing confining the deposit to the leasehold property, and not to the freehold, he was not entitled to any thing more than the interest in the lease, and that the operation of the written document accompanying the deposit could not be extended by parol evidence. It was a settled rule, that the Courts would not receive evidence to contradict, add to, or

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Ex parte Robinson.

vary the terms of a written instrument; for this would be to open a door to the very fraud and perjury, which the Statute of Frauds intended to prevent (*a*). He also cited the case of *Ex parte The Vauxhall Bridge Company*, 1 G. & J. 101.

The Court, however, thought that the petitioner was entitled to a lien on all the deeds as an equitable mortgagee, and accordingly made the order for the sale and liberty to bid as prayed; but as there was no writing accompanying the deposit of the deeds relating to the freehold property, they ordered the petitioner to pay the costs (*b*).

(*a*) 1 Phil. on Ev. 580. (*b*) And see *Ex parte Warry*, 19 Ves. 472.

Council Room, Lincoln's Inn, February 10.

Where a bankrupt, in consideration of his wife's fortune, gave a bond to trustees to pay them 3000*l.*, which, by the terms of a settlement, it was declared that the bankrupt should be entitled to the interest of during his life, and after his death the principal was to go to his wife; and the bankrupt made default in the payment of the money:—Held, that the trustees might prove for 3000*l.*, and that the interest upon the dividends to be received under such proof should accumulate until the 3000*l.* should be realized; after which, but not before, the interest might be paid to the assignees for the benefit of the creditors.

Ex parte James Turpin and Robert Woolsey Larcher, in the matter of George Brown.

THIS was a petition of the assignees of the bankrupt, stating, that the bankrupt previously to his marriage with *Mary Coates* his present wife, on the 9th of June, 1824, entered into a bond to *Thomas Partridge* and *John Copland* in the penalty of 6000*l.*, conditioned for the payment to them by the bankrupt of the sum of 3000*l.*, with interest from the date after the rate of 5*l.* per cent. per annum. That by an indenture of the same date, made between *Mary Coates* of the first part, the bankrupt of the second part, and the said *Thomas Partridge* and *John Copland* of the third part,

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it was declared that *Partridge* and *Copland* should stand possessed of the said sum of 3000*l.*, upon trust for *Mary Coates* until the marriage, and afterwards to pay to, or otherwise sufficiently authorise and empower, the bankrupt and his assigns to receive and retain the dividends, interest, and annual proceeds, to his and their own use and benefit, for his life; and after his decease, in case his intended wife should survive him, upon trust for the wife, for her own use and benefit. But in case the wife should die, leaving the bankrupt surviving, upon trust for such person as the wife, notwithstanding her coverture, by deed or will should appoint; and in default of such appointment, then as to one-third part thereof, and of the funds and securities whereon the same might be invested, upon trust for the bankrupt, for his own use: and as to two other third parts, in trust for such persons of the kindred of the wife, living at her decease, as would be entitled under the statute of distribution, in case she had died unmarried and intestate.

It was then provided, that the trustees should not be at liberty to call in, nor compel payment by the bankrupt of the said sum of 3000*l.*, or any part thereof, during the joint lives of the bankrupt and his wife, unless requested so to do in writing by the wife; but that such principal monies might continue to be secured on the bond of the bankrupt, without any further security. But in case the bankrupt should pay off the said 3000*l.*, the trustees might at any other time again lend it to the bankrupt, upon the like security of his bond.

The petition further stated, that the marriage took effect, and that the wife was still living. That the commission issued against the bankrupt on the 25th of

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July, 1829, and that the petitioners were appointed his assignees. That the said trustees had been permitted to prove for the said sum of 3000*l.*; and a dividend of 8*s.* in the pound having since been declared, the trustees had received the sum of 1200*l.* in respect thereof, and that another dividend of 5*d.* in the pound had also since been declared, to which the trustees were entitled. That the petitioners were advised, that in respect of the bankrupt's life estate under the aforesaid settlement, they were, as such assignees, entitled to have the said dividend already paid to and received by the trustees, and the further dividend now payable, as well as all future dividends, in respect of the said debt of 3000*l.*, invested in the name of the Accountant-General in trust in this matter, and to have the interest and dividends to accrue due thereon, during the life of the said bankrupt, paid to the petitioners, as part of the estate and effects of the said bankrupt.

The petitioners therefore prayed, that the Court would direct, that the said dividend already paid to and received by the said trustees, and the said further dividend now payable, and all further dividends to become payable, in respect of such debt of 3000*l.*, might be invested in the 3 per cent. consolidated bank annuities, in the name of the Accountant-General, in trust in this matter; and that the interest and dividends to accrue due thereon, during the life of the bankrupt, might be paid to the petitioners as part of his estate and effects; and that this Court would for that purpose direct the trustees to pay the said sum of 1200*l.*, the amount of the dividends received by them as aforesaid, into the bank, in the name and with the privity of the Accountant-General, in trust in this matter, to be by him invested

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accordingly; and that the petitioners might be at liberty, in like manner, to pay into the bank, in the name and with the privity of the Accountant-General, in trust in this matter, the further dividend now payable, and all future dividends, to be invested in like manner.

The affidavit of *Mary Brown*, the wife of the bankrupt, filed in opposition to the prayer of this petition, stated, that by the indenture mentioned in the petition it was recited, (as the fact was,) that the deponent (then *Mary Coates*) was entitled, in her own right, to the sum of 3500*l.* sterling and upwards; and that upon the treaty for the marriage it was agreed, that the deponent should pay over to her intended husband the whole of such principal money for his own absolute property, and that he should execute a bond to the trustees to the effect of that stated in the petition, which was accordingly duly executed by the bankrupt; and that the said sum of 3500*l.* was, in pursuance of the said agreement, duly paid to the said bankrupt, before his marriage with the deponent.

Mr. *Swanston* and Mr. *Rogers*, for the petitioners, contended against the right of the trustees to retain the dividends, and that the assignees were entitled to the interest arising from them during the life of the bankrupt, for the benefit of his general creditors. The bankrupt was not here placed in the situation of a trustee; he entered merely into a common money bond, and he was, therefore, nothing more than a mere common debtor to the trustees. By the terms of the settlement, the trustees were bound to pay the interest of the money to arise on the bond to the bankrupt for life. If indeed there had been no such reservation, and the

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deed had provided that the interest should be paid to the wife for life, in the first instance, and there had consequently been only a resulting trust for the husband, then it is admitted, that the assignees could not substantiate the present claim. In this case, however, it is otherwise; and as the bankrupt would be entitled to the interest for his life, so it is quite clear that, on his bankruptcy, his interest would pass to his assignees. [*Sir G. Rose.* The assignees have only the same right as the bankrupt, subject to all the equitable interests, in the fund; and it is quite of course that the fund must be re-established, before the assignees can claim the interest on the dividends.] Suppose the husband had sold his life interest in this property, the purchaser would clearly be entitled to the dividends, discharged of all claim of the trustees to have the 3000*l.* made good. In what then does this case differ? Here, by the legal effect of the assignment, that interest becomes the property of the assignees, for the benefit of the general creditors, and in like manner must be discharged of any claim upon it by the trustees.

If any doubt could be entertained upon this question, reference must be had to two principles, one relating to bankruptcy, and one not. It has been laid down, that if the wife contributes a sum of money on the marriage, which is invested in the hands of trustees for the benefit of the husband, his assignees cannot compel the payment, while the husband has not fulfilled his own obligation to make a provision for the wife. That is, when the assignees are obliged to come into a Court of equity to compel the performance of a trust, the Court will, as they require equity, make them do equity, by securing the intended settlement to the wife. This

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is the foundation of the principle. But in *Ex parte Mitford*, 1 Brown, 398, (Belt's edition,) the facts of which case were nearly similar to the present one, Lord *Thurlow*, though he admitted the trustees under the settlement to prove under a commission against the husband, declared that the assignees would have a right to claim whatever the bankrupt would claim against the trustees, and accordingly directed a rebate upon the value of the funds. This case is explained by the terms of the order, which was called for by *Sir W. Grant* on one occasion when the case was cited, to clear an ambiguity. It is true, when a banker becomes bankrupt, having in his hands the money of a bankrupt estate under which he is a creditor, it has been held that he is not entitled to receive a dividend on his debt, till the bankrupt's estate has been reimbursed the loss occasioned by his insolvency (*a*). But that case has no application to the present. For here there was no obligation on the part of the bankrupt to distribute any part of his life interest, for the benefit of any individual. The right of the assignees is recognized by various cases, and by all the text books. And they cited *Ex parte Verner*, 1 Ball & B. 260, *Stratton* v. *Hale*, 2 Bro. C. C. 490, *Ex parte Smith*, 1 Cooke, B. L. 223, *Ex parte Groome*, 1 Atk. 114, *Priddy* v. *Rose*, 3 Mer. 104, Mont. & G. B. L. 442, and 1 Deacon, B. L. 221, in the last of which works it is said, that "whether the sum permitted to be proved by the trustees, is the original property either of the husband, or of the wife, if the husband is entitled to the interest for life, or to a subsequent contingent interest, the Court will order the dividends on the sum proved to accumulate as a

(*a*) *Ex parte Graham*, 2 Rose, 74; 3 V. & B. 130.

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fund, the interest of which fund the assignees will be permitted to receive, if the bankrupt is entitled to a life interest in the property, the fund itself being kept together, to await any future contingency declared by the marriage settlement." If the prayer of this petition is refused, it will have the effect of giving to the husband, on the one hand, a considerable property during his solvency, to be taken from him on his bankruptcy, by which he will have obtained a fictitious credit to delude the world,—and on the other hand, it will operate as giving a preference to one class of creditors over another. This would be contrary to every principle of the bankrupt laws, which were framed with a view to an equal distribution among all the creditors. There is no case to be met with, where an equity has been declared in favour of the objects of a settlement, because there is a deficiency of dividends. In *Ex parte Mitford*, the case was one of a proof by trustees of a sum unsatisfied and due from the bankrupt, in which he took a life interest; and the Court there would not permit the trustees to prove, without deducting the value of the life interest. [*Sir G. Rose.* Have you any case to meet the point, where the trustees have already proved, and are entitled to the dividends? Must not the proof be expunged, before you can affect the rights of the trustees?] The assignees in this case might have objected to the proof in its present shape; for they had a right to insist that the commissioners should have previously ascertained the value of the bankrupt's life interest, and that the proof should have been limited to the residue. [*Sir G. Rose.* Then why have you not applied to expunge the proof?] We only now apply to the Court to deal with the proof,

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as if there was no objection to it. This is a case substantially between two classes of equitable creditors, and the Court has to determine whether the equity of the trustees is to prevail over that of the Bankrupt's general creditors. But if there be a difficulty, on the ground of the application being to the equity of the Court, then we say that the trustees have proved for a larger sum than they are entitled to; for the proof ought to have been only for the amount of the debt, deducting the life interest. [*Sir G. Rose.* This is merely in effect a bill in equity by the assignees, to take from the trustees those dividends which are now in their hands, as the legal consequence of their proof.]

Mr. *Bigg* appeared for the trustees.

Mr. *Twiss* and Mr. *G. Richards,* for the wife and children of the bankrupt, contended, that in no case had it ever been held, that the assignees could stand in a better situation than the bankrupt himself. Whatever equities would attach on the bankrupt will equally attach on the assignees. So it was in the case of *Ex parte Mitford.* There the trustees petitioned to be allowed to prove. They had no legal, but only an equitable, right to prove. Here, however, it was different. The trustees, having a legal right, had proved. If the trustees had not proved, the assignees might perhaps have been entitled according to the prayer of their petition. But, after having proved, the trustees are justified in retaining all monies coming to their hands, till the trust fund is fully paid to them. The trustees in this case have a strict legal right; there is here no conflicting of equities, as there was in all the

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cases cited on the other side: and the maxim of "he that will have equity must also do it" was not to be lost sight of on the present occasion.

As the bankrupt's estate here has had the benefit of the wife's fortune, the Court will protect the interests of the wife and children. Can the bankrupt in this case, who has made default in the payment of the 3000*l.* to the trustees, come into Court with any equity, until he has paid the whole of that sum, pursuant to his covenant in the marriage settlement? And ought the mere circumstance of his bankruptcy to place his assignees in a better situation? The judgment in *Priddy* v. *Rose*, 3 Mer. 104, is a clear decision to the contrary; where Sir *W. Grant* says, "it matters not, whether in bankruptcy, or not, the trustees have a right to stop the dividends, until the principal is paid."

All the cases cited by the other side are not on the prayer of assignees, but are those where trustees have applied to prove under the commission, or have come into Court seeking some indulgence. The principle laid down in those cases cannot be applied to this; for we ask no favour of the Court, and ought not to be deprived of our legal rights. A Court of equity never takes the dividends of a trust fund out of the hands of trustees, for the benefit of a defaulter, until he has made good his default. If the bankrupt, therefore, or his assignees, will make good the trust fund in question, then, but not till then, are the assignees entitled to the dividends. But at present we have the legal right to them; and an application is now made to a Court of equity to take out of our hands, what we are not only legally, but equitably, entitled to. [*Sir J. Cross.* Is there not a conflicting equity here?] It is true, that

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neither party can touch this fund, without the assistance of a Court of equity. But as the assignees must make their title through the bankrupt, and the bankrupt has received the whole of his wife's fortune, in respect of which he contracted certain engagements with the trustees for her benefit, will the Court now permit his assignees to have these dividends, until the bankrupt has made good his engagements? Or, in other words, shall the bankrupt, who has already been paid his wife's fortune, be paid in addition any portion of that sum which he covenanted, but which he has neglected, to pay to the trustees, and so have the money twice over?

Mr. *Swanston*, in reply. There are two equities in this case, and the question is, which is to be preferred, that of the general creditors, or that of the trustees. Why is the interest that a bankrupt takes under a settlement not to share the fate of any other part of his property? Here I contend, that proof is equivalent to payment. Where there is no bankruptcy, it may be otherwise; but proof under a commission represents the whole interest of the party proving. And the implied payment does not depend on the deficiency of dividends; for that is quite a matter of accident, and cannot give any equity to the trustees; otherwise the whole burden would be thrown upon the general creditors, for the benefit of the particular creditors, which is not consistent with equality of distribution. No case has been cited on the other side, where an application of this nature by assignees has been rejected. As to the argument that has been urged, of the obligation to do equity by those who seek relief in a Court of equity,—in this case, if the bankrupt lives long enough to make up the whole sum

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agreed to be paid by him to the trustees, his wife and children will have suffered nothing by his bankruptcy. And with respect to the objection, that the cases cited in support of this application were on the petitions of the trustees, and not on those of the assignees,—it is inconsistent that the rights of the creditors of a bankrupt should be varied, because the trustees petition in one case, and the assignees in the other.

Sir G. ROSE.—I do not entertain the least difficulty in this case, as to the principle that has been pressed upon us, of equalization in the distribution of assets. The trustees here are legal creditors,—they have proved like other creditors,—and are in possession of all the benefit resulting from that proof, as if they had acquired it by action at law. I should be glad to know, what right has any person to take it out of their hands. If the assignees have any claim to this money in the hands of the trustees, it could only be through the medium of a Court of equity, or by petition to expunge the proof. The assignees, who represent the bankrupt, say they claim the bankrupt's life interest in the dividends arising from the proof of the sum of 3000*l.* But the bankrupt, and those who represent him, must first do equity before they can claim equity; they can, therefore, claim nothing till they make good the deficiency in the amount of the trust fund arising from the default of the bankrupt himself. The trustees are as much trustees for the wife and children, as for the bankrupt. All that the assignees are entitled to ask in this case is, to have the dividends in the proof invested by the trustees, so as to accumulate till they reach the sum of 3000*l.*, and then any surplus to be paid to the assignees, as well as the interest on the principal sum, during the

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bankrupt's life. With respect to the costs, the assignees are entitled to theirs out of the bankrupt's estate, and the trustees to theirs out of the trust estate.

ERSKINE, C. J.—My opinion has not been shaken by any of the authorities that have been cited. I look at this case as involving a question of equity, and as one in which an assignee calls on this Court to do that which he could not obtain at law. The Court, however, will take time to consider of their judgment, that they may have an opportunity of examining the case of *Stratton* v. *Hale* (*a*), of which it has been said there appears to be no entry in the Registrar's book.

Sir A. PELL.—Of the justice of this case I entertain no doubt; but I state this under a restrictive feeling. For I cannot form a satisfactory judgment to my own mind, until I have an opportunity of examining the cases, and more especially the case of *Stratton* v. *Hale*.

Sir J. CROSS.—The argument on the part of the assignees deserves great consideration. The litigation in this case is between the creditors and the bankrupt's family, forming two distinct classes of creditors and *cestui que trusts*. The trustees have got into their hands 1200*l*., the interest of which the bankrupt's creditors say they are entitled to during his life. The bankrupt was bound to pay the trustees 3000*l*., before he could claim the interest of this money. But the question is, whether the creditors are bound by this obligation.

Cur. adv. vult.

(*a*) The Registrar's minute book was afterwards referred to, and the report of this case was found to be in substance correct.

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ERSKINE, C. J., after stating the substance and prayer of the petition, proceeded now to deliver the judgment of the Court. The first part of the prayer of this petition is not resisted; but the trustees claim the right to retain the interest upon the monies in their hands, until by accumulation the full amount of the principal sum, secured by the bond given by the bankrupt previous to his marriage, shall have been realized. And whether they should be allowed so to do, or be ordered to pay over to the assignees the dividends as they arise, was the question raised in argument before this Court.

Many authorities were cited by the counsel for the petitioners, in support of their claim; who insisted that no authority could be found, that warranted the retention of the interest by the trustees. The cases cited were, *Ex parte Smith* (*a*), *Ex parte Groom* (*b*), *Ex parte Verner* (*c*), *Ex parte Mitford* (*d*), and *Stratton* v. *Hale* (*e*). The Court has taken time to look into the authorities, and consider the point; and we are of opinion, that the trustees should be allowed to retain the dividends, until the full amount of the principal shall have been realized; and that when that shall have been done, the dividends shall be paid over to the assignees, during the life of the bankrupt, for the benefit of his creditors. The case of *Ex parte Smith*, though an instance in which the dividends were ordered to be paid to the assignees, was decided without reference to the question now before the Court, and does not bring with it therefore the authority of a decision upon the point here in contest. The same observation applies

(*a*) 1 C. B. L. 212. (*b*) 1 Atk. 114. (*c*) 1 Ball & B. 230.
(*d*) 1 C. B. L. 220; 3 Meriv. 105. (*e*) 2 Brown, C. C. 490.

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to *Ex parte Verner*. A similar order was made in *Ex parte Mitford* (*a*). But in that case, though the Court ordered the interest that might accrue on the stock purchased to be paid to the assignees under the commission, as part of the estate and effects of the bankrupt, it appropriated other funds, in which the bankrupt had a life interest, to be retained by the trustees, towards satisfaction of the principal sum of 3000*l.*; recognizing therefore in substance the principle now contended for by the respondents, and being in effect an authority *against* the petitioners. The case, however, of *Stratton* v. *Hale* is decidedly in point in their favour; but the reasons for the decision do not appear in the report; and as far as they can be collected from the arguments of counsel, the order seems to have rested upon some supposed difference between the rights of the assignees, and those of the bankrupt himself. And that distinction was relied upon in the argument of the case now before the Court. Such distinction, however, has in subsequent cases been denied, and their interests held to be identical. In *Mitford* v. *Mitford* (*b*), the Master of the Rolls asks, "But is an assignee under a commission of bankrupt placed in a different situation from that of the bankrupt himself?" And he then answers the question by adding, "I have always understood the assignment from the commissioners, like any other assignment, by operation of law passed his rights precisely in the same plight and condition as he possessed them. Even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take, subject to whatever equity the bankrupt was liable to." And in *Bosvill* v.

(*a*) 1 Bro. C. C. 398; 3 Meriv. 105. (*b*) 9 Ves. 100.

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Brander (*a*), Lord *Thurlow* makes use of similar declarations.

The case, therefore, of *Stratton* v. *Hale* appears to rest upon an erroneous foundation; and we have the authority of one of the members of the bench, whose long experience in matters in bankruptcy gives to his testimony the greatest weight, that it has been in practice overruled by a series of orders in bankruptcy, one of which, made by Lord *Eldon* in 1816 in the case of *Ramsay* v. *Ramsay* (*b*), was cited at the bar.

Upon the general principle, therefore, that if there had been no bankruptcy, the husband himself could not have claimed any interest from the trustees, until he had made good the principal; and that the assignees of a bankrupt are subjected to all the equity by which the bankrupt himself would have been affected;—the Court is of opinion, that the interest upon the dividends declared should be suffered to accumulate in the hands of the trustees, until the principal sum of 3000*l.* shall have been realized; and that afterwards the interest should be paid, during the bankrupt's life, to the assignees for the benefit of the creditors; and that, as to the rest, the order may be taken as prayed.

(*a*) 1 P. Wms. 459.

(*b*) In the case of *Ramsay* v. *Ramsay*, a bond was given to the trustees by the husband for the sum of 25,000*l.*, he having received the whole of his wife's fortune. The order of the Vice-Chancellor in this cause recited a previous order in bankruptcy made by Lord *Eldon*, by which it was ordered, that the trustees should go in under the commission issued against the husband, and prove the 25,000*l.* against *Ramsay*'s separate estate, and be paid dividends *pari passu* with the separate creditors; and that the trustees might detain the whole interest until they received the full sum of 25,000*l.*

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Ex parte BOWDEN, in the matter of BRETTELL.

February 27.

A joint creditor takes an equitable mortgage from one of two partners, as a security for his debt; after which that partner dies, and the other becomes bankrupt: Held, that the creditor might prove the amount of his debt, without the previous sale of his security.

THE petitioner had in the year 1822 lent 600*l.* to the bankrupt and his partner *King*, as a security for which they gave him their joint promissory note, and *King* also deposited in his hands the title deeds of certain property, to which *King* was separately entitled. *King* died in 1825, devising this property to *Brettell*, subject to the payment of his debts. At the time of *Brettell's* bankruptcy there was 500*l.* due to the petitioner, which he applied to prove under the commission; but his proof was rejected by the commissioners, on the ground that the property, which was the subject of the equitable mortgage to him, must be first sold towards satisfaction of the debt, and that he might then prove for the residue. He therefore now applied to the Court for an order, that he might be permitted to prove the full amount of his debt, without being compelled to give up his security.

Mr. *Jacob*, for the petitioner, contended, that he was clearly entitled to prove against the bankrupt, as surviving partner, on the joint promissory note; and he cited the case of *Ex parte Peacock*, 2 G. & J. 27, where it was held, that a joint creditor, having separate security from some of his co-debtors, was entitled to prove his debt against the joint estate, without surrender or sale of his security. The distinction is, that a party is only bound to give up his security, where it is on the property of the bankrupt; but not where it is a security on the property of a stranger, or third person. If a commission had issued against

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these parties in the lifetime of *King*, the deceased partner, there could be no question that the petitioner would have had a right to prove against the joint estate, and retain his security. And the mere circumstance of one partner devising his property to his co-partner, cannot divest the rights of any joint creditor holding the separate security of the deceased partner.

Mr. *Koe*, for the assignees, had no objection that the security should be sold, and that the petitioner should then prove for the balance due to him. This case is distinguishable from that of *Ex parte Peacock*. For in that case the bankruptcy took place immediately after the death of the partner giving the separate security; while here the security was given in 1822, and *King* did not die until 1825; and the business continued to be carried on by the surviving partner till 1831. In this case there was no joint estate remaining, which was applicable to the payment of this debt; and the very estate, on which the demand was created, was devised to the surviving partner. Where one partner becomes solely entitled to partnership funds, a joint creditor cannot prove until the separate creditors are paid the whole of their debts. This position is warranted by the case of *Ex parte Williams*, 11 Ves. 3, where Lord *Eldon* decided that upon a dissolution of partnership by the retirement of a partner, followed by the bankruptcy of the one who continued the business, the joint creditors had no right to charge specific property belonging to the partnership at the time of the dissolution, as applicable to the payment of joint debts, in preference to the separate creditors.

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ERSKINE, C. J.—I think, in deciding this case, we are bound by that of *Ex parte Peacock*. For though the bankrupt is now possessed of the property in question, yet he obtained possession of it by the act of his partner, subject to the prior claims of the petitioner.

The order was therefore made as prayed.

Ex parte WILLIAM LOWE and RICHARD CUTTILL, in the matter of ABRAHAM AARON.

Council Room, Lincoln's Inn, February 10, 11, 13, 14, *and* 16.

THIS matter came before the Court under three different petitions, presented by the above-named petitioners, who were the assignees (under the Act for the Relief of Insolvent Debtors) of the above bankrupt he having several years after his bankruptcy taken the benefit of that act. And the petitioner *Richard Cuttill* also stated himself to be a creditor of the bankrupt, though it did not appear that he had proved his debt under the commission.

By the first petition, presented to the Lord Chancellor on the 1st of July, 1831, the petitioners (amongst other matters) stated, that in the year 1817 a commission of bankrupt issued against the insolvent *Aaron*, under which he was duly declared a bankrupt; and that one *Thomas Husband*, the younger, was chosen and appointed sole assignee of his estate and effects. That Sir John Perring & Co. were chosen by the creditors as bankers, or treasurers, under the commission. That *Husband*, the assignee, had in the year 1818, as well as in subsequent years, received several large sums of money as part of the bankrupt's estate; but instead of paying the amount into the bankers'

The charge of 20*l.* per cent. imposed on assignees by 6 *Geo.* 4, c. 16, s. 104, for retaining the bankrupt's money in their hands, the bankrupt himself has no legal or equitable claim to, either in respect of his allowance, or his right to the surplus.

Pell, J., *dissentâ*

Quære. Whether this charge is to be 20*l.* per cent. *per annum*, during the whole period of retention, or only one single charge of 20*l.* per cent. upon the gross sum retained.

Quære. Whether the charge can be sustained on monies retained by assignees previous to the 1st of September, 1825, when the 6 *Geo.* 4, c. 16, first came into operation.

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chosen by the creditors, or making a dividend thereout, had, after payment of the expenses of the commission, retained in his own hands the balance for thirteen years; and therefore the petitioners suggested, that he ought to be charged in his account with interest at the rate of 20*l.* per cent. per annum on all sums so retained by him, from the times when he received the same.

The petition further stated, that no dividend had been made under the commission, and that the accounts of the assignee had never been audited by the commissioners; and further suggested, that if the accounts of the bankrupt's estate were properly taken against the assignee, there would be found in his hands money enough to pay all the creditors, and to leave a large surplus; to which the petitioners, as assignees of the insolvent, would be entitled, for the benefit of the subsequent creditors.

The petition then, after stating that the petitioners were appointed assignees under the Insolvent Act in the year 1830, proceeded to detail the endeavours they ineffectually made to procure an audit meeting; and that, having learned that two of the commissioners named in the commission of bankrupt were dead, and having in vain endeavoured to procure a meeting of the surviving commissioners, they obtained on the 4th of March, 1831, upon their own petition, a renewed commission addressed to the three surviving commissioners and two others named by themselves. After setting out the correspondence that took place between Mr. *Cole*, the solicitor for the petitioners, and Mr. *James Husband*, the brother of the assignee and the solicitor under the commission, the petition stated, that the renewed commission was delivered up to the assignee on the 23d of April, 1831,

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and that on the 26th of April notice was given in the Gazette of a meeting to be held on the 19th of May, for auditing the assignee's accounts, and also of a meeting to be held on the following day to make a final dividend, and to receive the proof of debts. That the petitioners attended with their solicitor at the place and time appointed for the meeting on the 19th of May having gone down from London to Plymouth for that purpose, but that two of the commissioners only attended; in consequence of which the meeting fixed for the 19th of May fell to the ground. That at the meeting advertised for the following day, the 20th of May, neither the assignee nor the solicitor attended; and therefore, although three of the commissioners met, they could do nothing without the production of the renewed commission, which had not yet been opened; and the petitioners were consequently obliged to return to London, without effecting any part of the object of their journey. They suggested, that the absence of the commissioners on the 19th of May, and of the assignee and solicitor on the 20th, was the result of contrivance by the assignee and his solicitor, for the purpose of preventing the audit of the accounts and the declaration of a dividend; and they detailed a variety of circumstances to support that suggestion.

The petition then alleged, that on the 27th of May two other meetings were advertised for the 20th and 21st of June, for the audit and dividend, for which the commissioners were summoned, and notice thereof was sent by the solicitor to the commission to Mr. *Cole*, the solicitor for the petitioners. That the petitioners and their solicitor again went down from London to Plymouth, and attended at the time and place fixed for that

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meeting, but that neither the assignee nor his solicitor, and only one of the commissioners, attended, and that no meeting took place either on the 20th or 21st of June. That, in fact, another renewed commission had been taken out by *Husband* the assignee on the 16th of June, 1831, in pursuance of an order procured for that purpose upon his own petition on the 14th of June; and it was suggested, that such renewed commission was taken out by Mr. *Husband*, to prevent the petitioners getting a just account of the bankrupt's estate, and in fraud of the great seal; and was therefore void, and ought to be superseded.

The petitioners then proceeded to detail some circumstances, which they suggested were fit subjects of inquiry before the commissioners; and they alleged, that the debt due from *Aaron* to the petitioning creditors was only due from him as surety, and that the amount had been satisfied by the principal debtor; and that in order to quiet the creditors, the assignee had compounded with them for small sums of money. They finally suggested the propriety of superseding both the renewed commissions, and of issuing another renewed commission directed to one of the lists of the then London commissioners.

And they prayed, therefore, 1. That the order of the 14th of June, 1831, for superseding the renewed commission of the 4th of March, 1831, and issuing the second renewed commission of the 16th of June, 1831, might be discharged. 2. That the commission of the 16th of June might be superseded. 3. That the former renewed commission of the 4th of March might be also superseded, and that a new renewed commission

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might be issued directed to London commissioners; or that the commission of the 4th March might be proceeded in. 4. That the assignee might be ordered to account for the bankrupt's estate which had come to his hands; and that in that account he might be charged with interest, according to the statute, upon such monies as should be found to have been retained or applied by him improperly. 5. That the costs of issuing the first renewed commission of the 4th March might be paid to the petitioners out of the bankrupt's estate. 6. That the assignee, or his solicitor, might pay the expenses of the petitioner's attendance at the several meetings at Plymouth, and also the costs of this petition.

By a supplemental petition presented to the Lord Chancellor on the 25th November, 1831, the same petitioners stated, that after they had presented their former petition, and had served the same on the assignee and his solicitor, meetings had been held under the commission of the 16th June, at which the commissioners proceeded to audit the accounts of the assignee, and after making certain allowances and charges therein mentioned, found that there was a sum of 1637*l.* 10*s.* (*a*) in the hands of the assignee, which sum they ordered to be divided amongst the creditors under the original commission. The petitioners then proceeded to detail their objections to the several items in that account, which had been first suggested to the commissioners, and overruled by them; and, amongst other complaints,

(*a*) This sum was made up as follows :—

	£.	s.	d.
Proceeds of the bankrupt's estate	1293	17	0
Interest charged at the rate of 20*l.* per cent. on the sum of 1600*l.* improperly retained by the assignee	320	0	0
Interest at 5*l.* per cent. on the sum of 500*l.* retained by the assignee	23	13	0

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they stated that the commissioners did not ascertain what balances had from time to time been in the hands of the assignee, and charge interest at the rate of 20*l.* per cent. *per annum* upon such balances for the time they were retained in his hands; but only found that the assignee had retained the sums of 1600*l.* and 500*l.* in his hands, and charged him in his account with the sum of 320*l.*, being 20*l.* per cent. on the first sum, and the further sum of 23*l.* 13*s.* for interest at the rate of 5*l.* per cent. per annum, on the sum of 500*l.* The petitioners then suggested, that the assignee ought to have been charged with interest at the rate of 20*l.* per cent. per annum for the time such monies were retained by him, and that the bills of costs should be taxed, and an account taken of the debts purchased by the assignee.

The prayer was, therefore, that an account might be taken accordingly; that the assignee might be charged 20*l.* per cent. *per annum;* that the commissioners might review the allowances; that a Master in Chancery might tax the bills of costs, and inquire what debts were purchased by the assignee, and at what price; that the assignee might be restrained from taking more as dividends, than he paid for the several debts; and that the costs of the petition, and of reviewing the account might be paid by the assignee, or out of the bankrupt's estate.

These petitions came on to be heard before the Vice-Chancellor, on the 26th December last, who dismissed them both with costs; against which decision the petitioners appealed to the Lord Chancellor; and the petition of appeal was standing in the Lord Chancellor's

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paper, when the Court of Review ordered it to be transferred for hearing before this Court (*a*).

Much of the argument, on the hearing of these petitions, turned on the charges of fraudulent contrivance and evasive conduct, made against the assignee and his solicitor in the various statements of the petitions and affidavits, which are also referred to by the judges in their judgments; but the material questions arising out of these petitions were the following:—

1. Whether the charge of 20*l.* per cent. under the 6 *Geo.* 4, c. 16, s. 104, should be merely one single charge calculated on the gross sum retained, or a charge of 20*l.* *per cent. per annum* during the whole period of its retention.

2. Whether the bankrupt had such an interest in the charge, as to enable him to petition for an order to enforce it.

3. Whether the charge extended beyond the time when the 6 *Geo.* 4, c. 16, began to operate.

Mr. *Twiss* and Mr. *Teed*, in support of the petitions. The petitioners are entitled, as assignees of the bankrupt under the Insolvent Act, to any eventual surplus of his estate under the commission. And the petitioner *Cuttell* is here in a double character, not only as an assignee of the bankrupt under the Insolvent Act, but also as a joint creditor of the bankrupt and his partner *Levy* at the time of the issuing of the commission. After dwelling then at great length upon the facts of the case as detailed in the petitions and affidavits, they were stopped by

(*a*) See *ante*, pages 30, 43, and *post*.

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Erskine, C. J. suggesting a further inquiry before the commissioners as to the facts, and that the argument should be confined to the questions of law, namely, whether the charge imposed by the 104th section was 20*l. per cent.* on the gross sum retained, or 20*l. per cent. per annum*, and whether the petitioners had any *locus standi in curiâ* in respect of this charge.

Sir G. Rose.—The great difficulty that operates on my mind is, whether the bankrupt, or his assignees under the Insolvent Act, can under the act of parliament claim any interest in this charge of 20*l.* per cent., which seems entirely referable to the interests of the creditors, and for their protection alone. In regard to the bankrupt's allowance and surplus, he is entitled to these from the *proceeds of his estate*, and not from any penalty imposed for the misconduct of the assignees. As his right to the allowance is made to attend upon "the net produce of his estate," under the 6th *Geo.* 4, c. 16, s. 128, the bankrupt must place himself legally in Court, to claim this penalty from his creditors. But we are told, that the petitioner *Cuttill* is a creditor of the bankrupt. I do not find, however, that he is a creditor on the proceedings under the commission, and he cannot come before this Court until he has proved his debt. And as to any further inquiry before the commissioners, I think, that if in the result of this argument we should deem it probable that the bankrupt might work out his way to a surplus before the commissioners, it is but right that the petitioners should give security for costs.

The Court then desired the argument to be confined to the law of the case.

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Mr. *Twiss* and Mr. *Teed*, in continuation. The chief question to be decided is, certainly, whether the statute contemplates only *one charge* of 20*l. per cent.* on the gross sum retained, or 20*l. per cent. per annum* during the whole period of its retention. Now the 104th section of the statute expressly says, that "every such assignee shall be liable to be charged in his account with such sum, as shall be equal to interest at the rate of 20*l. per cent.* on all such money, *for the time during which* he shall have so retained or employed the same." This must mean, that according to the *duration* of the time shall be the amount of interest paid. And from a reference to the 106th section, which directs the commissioners "to ascertain what balances have been *from time to time* in the hands of such assignees," it appears plain, that the statute intended that the commissioners should make rests in their accounts. In the 51st section, also, which relates to the proof of debts not payable, it is declared that they may be proved, deducting discount at the rate of 5*l. per cent.*, to be computed from the declaration of a dividend to the time the debt would have become payable. The words in the 104th section "20*l. per cent.*" must therefore mean "20*l. per cent. per annum.*" This too will be more clearly proved, by referring to the 132d section, which gives the creditors interest on their debts in the case of a surplus; the words used are, that they "shall receive interest on their debts from the date of the commission, *at the rate of* 4*l. per centum*," merely, without using the words "*per annum.*" So, that the language of this section, which contemplates an allowance of interest to the creditor, to be calculated in proportion to a certain time, is precisely the same as the language of the 104th

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section which charges assignees with interest at the rate of 20*l. per cent.* The 4th section of the 49 *Geo.* 3, c. 121, which is in *pari materiâ*, and from which the clause of the 6 *Geo.* 4, was taken, expressly says "20*l. per cent. per annum.*" The same language is also used by the Insolvent Act, 7 *Geo.* 4, c. 57, which imposes a similar charge of 20*l. per cent. per annum* on the assignees of the insolvent, for the wilful retention of money, and which last statute was enacted the very year after the passing of the 6 *Geo.* 4, c. 16.

But this is not a penalty, any more than 5*l. per cent.*, or 3*l. per cent.*, would be a penalty. Yet even if it be so considered, it is still nothing more than a penalty in the nature of liquidated damages, as in the case of a penalty for the breach of a farming covenant, which, it has been decided in *Lowe* v. *Peers* (*a*), a Court of equity will not relieve against. And in the more modern case of *Stanley* v. *Wharton* (*b*),—which was an action against a defendant, founded on the 11 *Geo.* 2, c. 19, s. 3, for assisting the tenant of the plaintiff to remove goods off the premises, in order to prevent a distress, whereby the plaintiff sought to recover double the value of the goods removed,—it was held to be not so much a penalty on the defendant, as a remuneration to the landlord for the injury he had sustained. So also, in *Wackerbath* v. *Powell* (*c*) the charge of 20*l. per cent.* was treated not as a penalty, but as a debt. [*Sir G. Rose.* In *Wackerbath* v. *Powell* it was not treated as a specialty, but as a simple contract debt; and it was not considered as belonging to the bankrupt.] In the *Attorney General* v. *Sudell* (*d*), which was a case of

(*a*) 4 Burr. 2228.
(*b*) 9 Pri. 301.
(*c*) Buck, 495; 2 G. & J. 151.
(*d*) Prec. Chan. 215.

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simony, it was held, that a Court of equity would advance the remedy given by the statute; and the penalty on the offender in that case was considered in the light of a remuneration to the sufferer. When this case was before the Vice-Chancellor, it was contended on the other side, that the charge of 20*l. per cent.*, imposed by the act of parliament on an assignee for improperly keeping money in his hands, was a statutory penalty, and that the words of a statute imposing a penalty must be construed strictly. In *Heydon's case* (*a*) Lord *Coke* says, there are four things to be considered in the interpretation of statutes, be they penal or beneficial. 1. What was the common law before the making of the act. 2. What was the mischief and defect, which the common law did not provide for. 3. What remedy the legislature has provided; and 4. The true reason of the remedy. And he adds, that the duty of all judges is to construe the statute, so as to repress the mischief, and advance the remedy. Now, the mischief here provided against was, the practice of assignees keeping the bankrupt's money in their hands for long periods of time, without dividing it among the creditors. And if the words of the clause imposing the charge of 20*l. per cent.* are not to be construed as 20*l. per cent. per annum*, the longer an assignee retains the money, the less in proportion will he have to pay for the retention: so that, according to this construction, the statute would, instead of repressing the mischief, hold out a strong temptation to him to commit the very offence, which it was expressly intended to prevent. It would be preposterous therefore to hold, that the single sum of 20*l.*

(*a*) 3 Co. Rep. 7.

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per cent. is chargeable, whether the assignee retains the money two months, or 20 years.

With respect to the bankrupt's interest in this charge, why should he not have the same interest in it, as if the assignee had laid out the produce of his estate in the purchase of Exchequer bills, or had invested it in the funds, or on mortgage; in each of which cases the interest, or dividends, would constitute one fund with the principal laid out, to be divided among the creditors. So here, the commissioners are required to take the accounts, and charge a certain rate of interest; which clearly forms part of the bankrupt's estate. Supposing, after a wilful retention of money, no creditors should call on the commissioners to make this charge of 20*l. per cent. per annum*, has not the bankrupt a right to call for it? It is the duty of the commissioners, at all events, to make the charge on the assignees, without considering what effect the charge will have; and the assignees are bound to pay it. For what purpose, then, but to divide among the creditors, and operate as an increase of the funds arising from the bankrupt's estate. [*Sir A. Pell.* I was going to put this point. Is it to be paid back to the assignee, if there is a surplus, or has he any claim to it in that event?] The creditors can have no claim but for their debts, and interest, in the case of a surplus. Is the assignee, therefore, to escape this charge, and the commissioners to neglect their duty, because the creditors are satisfied? Whom is the charge to go to, in that case, but the bankrupt? It does not go to the Lord Chancellor, or to the creditors, or to the assignees. Supposing it was only the legal interest of 5*l. per cent.*, would not that go to the bank-

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rupt's estate? Or suppose this was a case under a second commission, is not the bankrupt entitled to make this charge, in order to pay 15*s.* in the pound? But in every case the bankrupt looks forward, as a matter of course, to any surplus arising from his effects, or to any allowance to which he may be entitled, on paying so much in the pound. It is, therefore, a serious injury to him, for the assignees to put in peril those funds, which, if properly administered, may produce such surplus or allowance; and the bankrupt is as much protected by the statute, when acting honestly and *bonâ fide*, as any one of the creditors under his commission.

Then, as to the retrospective effect of the clause in question. At the time of the passing of the 6 *Geo.* 4, c. 16, the commission against this bankrupt was in existence; and the assets continued in the hands of the assignee from the year 1818, up to the passing of that act. The balance, therefore, so retained by the assignee formed part of the bankrupt's estate, and a dividend was payable to the creditors out of that fund, increased as it would be by the charge of 20*l. per cent. per annum.* This appears from the case of *Ex parte Bray* (*a*). It seems clear, then, that the 104th section refers to any period of time during which the money may have been retained by the assignee, although before the passing of the act. For the words are, that the assignee shall be charged for the time during which he *shall have so retained or employed* the money, or during which he *shall have so neglected* to invest the same; which shews plainly, that the statute contemplated a charge for any period antecedently to the

(*a*) 1 Rose, 114.

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passing of the act, during which the money might have been improperly retained. But by the 135th section of the 6 *Geo.* 4, c. 16, all the rights, claims, and remedies of the creditors under commissions then subsisting are expressly reserved, except as in the act is specifically enacted; and there is nothing in the act to extinguish the right of the creditors under any existing commission to this charge of 20*l.* per cent. If the 6 *Geo.* 4, c. 16, abolished all rights under existing commissions, it would follow, that no dividend could be declared under such a commission, subsequent to the passing of that act. But as the commissioners are by the 106th section directed to audit the accounts of the assignees, and ascertain what balances *have been from time to time* in their hands, and are, therefore, not restrained to any given period in taking the account, it would seem, that their right to charge the assignee, throughout the whole period for which the account is taken, is equally unlimited. Under the 106th section the commissioners are to take the account from the beginning of the receipts and payment by the assignee, and their power to *charge* is co-extensive with their power to inquire.

Mr. *Montagu*, Mr. *Jacob*, and Mr. *Bethell*, for the respondents.

The real question in this case is, whether the assignee can be charged 20*l. per cent. per annum.* That is the foundation upon which the whole superstructure of the argument is raised. Then have the petitioners a right to petition upon any pecuniary interest which they possess, or upon any probable pecuniary interest? Or, have they any merits? We submit, 1. That the

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charge imposed by the statute is not 20*l. per cent. per annum.* 2. That the statute in this instance does not operate retrospectively. 3. That the charge is not intended for the benefit of the bankrupt.

1. The charge is not 20*l. per cent. per annum.* As the 49 *Geo.* 3, c. 121, s. 4, is repealed by the 6 *Geo.* 4, c. 16, the charge, if made at all, can only be made under the provisions of the latter statute. For the effect of repealing a statute is, to obliterate it as completely from the records of parliament, as if it had never existed. *Kay* v. *Goodwin,* 6 *Bing.* 582, *per Tindal,* C. J. But there is no provision in the 6 *Geo.* 4, c. 16, by which the charge of 20*l. per cent. per annum* is imposed; the words of the 104th section are merely "20*l. per cent.* on all such money." Now, these words are not doubtful, but plain and positive: and in the construction of statutes, when words are not doubtful, they must be construed according to their obvious meaning, and no other words are to be supplied. Thus, in *Jones* v. *Smart,* 1 T. R. 52, Mr. Justice *Buller,* says, "*A casus omissus* can in no case be supplied by a Court of law; for that were to make laws." Neither can there be any inference in the construction of statutes, if the words will not warrant such inference, although the intent of the legislature may be ascertained. For in *Read* v. *Sowerby* (*a*), where a particular construction was attempted to be put upon the 14th section of the 49 *Geo.* 3, c. 121, which was not warranted by the words of that section, Lord *Ellenborough* said, "If the act so meant, *quod voluit non dixit.*" So, in the case of *Guthrie* v. *Fish* (*b*), which was upon the construction of a private act of

(*a*) 3 M. & S. 80. (*b*) 3 B. & C. 178; 5 D. & R. 24.

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parliament, Mr. Justice *Bayley* says, " Unless we see very clearly that the meaning of the legislature goes beyond the words of the statute, we cannot do so. It is a dangerous rule of construction to introduce words not expressed, because they may be supposed to be within the mischief contemplated." And the same doctrine was held by the Court of Exchequer in the case of *Higgins* v. *M'Adam* (*a*). So, in *The Attorney General* v. *Jefferys* (*b*), Lord C. B. *Alexander* uses this language: " Something has been said about the different rules of construing statutes, with reference to their being remedial, or penal. That is certainly a distinction of some consequence, where the question of construction comes to a measuring cast; but where the language of an act of parliament is clear and plain, I am bound to give it effect." So also, in *Bell* v. *Bilton* (*c*), Lord C. J. *Best* said, " That the Court was bound to give effect to the clear intent of the legislature expressed in an act of parliament, whatever may be the consequence."

But we contend here, that the words " *per annum*," which were in the former statute of 49 *Geo.* 3, c. 121, s. 4, were purposely omitted in the 6 *Geo.* 4, c. 16, s. 104. The former statute imposes the charge " for the time *or times*" during which the assignee shall have retained the money; while the latter statute merely says "*for the time*," be it great, or be it small. The intent, therefore, of the last act is, that assignees shall in all cases pay 20 *per cent.*, and that the amount shall not depend upon the period of retention; an alteration in the enactment, which was most probably intended as a check upon the creditors, and to insure their vigilance

(*a*) 3 Young & J. 10. (*b*) 13 Price, 580. (*c*) 4 Bing. 618.

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in protecting their own interests. For it was Lord Eldon's opinion, in *Wackerbath* v. *Powell*, that the injury which creditors sustained was not so much from the misconduct of assignees, as from their own negligence. [*Sir A. Pell.* How can you reconcile Lord Eldon's words in that case, that under the 6 *Geo.* 4, c. 16, s. 104, the Commissioners were to charge the assignee in account with the 20 per cent., *as in the former statute? Sir J. Cross.* You put it, as if the creditors were the only culpable party. Acording to your argument, if the assignees had enough to pay 20*s.* in the pound, with interest at 5 per cent., they might keep the money as long as they pleased.] There is no reason to suppose, that the important words "*per annum*" were omitted by accident; but, on the contrary, that it was an intentional diminution of the former charge of 20 *per cent. per annum*, to one charge merely of 20 *per cent.* The same reasoning is used by Lord Lyndhurst in the case of *Exparte Burgess*, 2 G. & J. 200, in commenting on the second section of 6 *Geo.* 4, c. 16, which relates to the different species of trading, and in which there is an omission of words relating to brickmakers, which were inserted in the previous act of 5 *Geo.* 4, c. 98, s. 2. "It must therefore be inferred," he says, "that they were *omitted* by the legislature, as *not intending* to include this description of persons." By the 106th section the Commissioners are to audit the accounts of the assignees, and ascertain what balances have been from time to time in their hands. And the meaning of this section, coupled with the 104th, is, that if the assignees keep back even one farthing for a fortnight, the assignees are chargeable with the whole 20 per cent. It is contended, on the other side,

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that the construction of the 104th section may be aided by referring to other sections of the act, where interest is given at so much per cent. *per annum*. But we say, that this being a penal clause, they cannot call in aid other parts of the statute to increase the penalty, nor to construe this particular section *ex visceribus actûs*.—But we further contend, that our argument is in part strengthened by this very introduction of the words "*per annum*" in other clauses of the act, and the omission of them in the clause in question. In the 100th section, which charges an assignee with interst at 5*l*. per cent. on unclaimed dividends, the words "*per annum*" are introduced. So in the 55th section, where a provision is made for suing a surety for the accruing payments of an annuity, he is charged with interest expressly at the rate of 4*l*. *per cent. per annum*. When we find therefore in a statute words sometimes inserted, and sometimes omitted, and the insertion or omission is contrary to the provisions of a former statute on the same subject, the presumption is, that the legislature did this purposely by way of amendment. But even where the words "*per annum*" are expressly introduced, the rate and period of interest are frequently left in the discretion of the Judges,—as in the 110th section, where the words are, "and also such further sum as the Commissioners shall think fit, *not exceeding* in the whole 20*l*. *per cent. per annum*." In other acts of parliament, also, the same words occur, as to its being in the discretion of the Court, or the persons empowered to make the charge. Thus, in the Insolvent Act, 7 *Geo.* 4, c. 57, s. 36, it is provided, that where an assignee wilfully retains the money of the insolvent, the Court shall have power and authority to charge him

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with such sum of money, as shall be equal to the amount of interest, computed at a rate not exceeding 20 *per centum per annum*. If the words "*per annum*," therefore, are to be inserted by inference in the 104th section, without inserting "at the discretion of the Commissioners," it would be to make law, instead of interpreting it. But in the 132d section, where it is provided, that in case of a surplus the creditors are to "receive interest on their debts from the date of their commission, at the rate of 4*l. per centum*," there was no necessity to add here the words "*per annum*;" as the word *interest*, when used alone, implies annual computation. But in the 104th section the expression is, only, "such sum as shall be *equal to interest*." So in the 57th section, which enables the holder of a bill or note to prove for the *interest* due thereon, this means legal interest; and the mode of computing legal interest is well known. And the like in the 51st section, which enables a creditor to prove a debt payable *in futuro*, "and receive dividends equally with the other creditors, deducting only thereout a *rebate of interest* for what he shall so receive, at the rate of 5*l. per cent.*" Here there is no need to add "*per annum*;" for the words previously used, "rebate of interest," evidently show that the computation is to be annual.

But there is another rule of construction, which has been applied to this very act of parliament, and that is, that the Court, if necessary, will refer to a repealed statute, in order to interpret an existing one. Thus, by the 5th section of the 6 *Geo.* 4, c. 16, it is enacted, that if any trader, having been arrested, shall "lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such

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trader shall be thereby deemed to have committed an act of bankruptcy." Now, in the previous statute of 21 *Jac.* 1, c. 19, s. 2, the lying in prison for two months was declared to be an act of bankruptcy, "from the time of the first arrest;" which words are omitted in the 6 *Geo.* 4, c. 16. And Mr. Justice Bosanquet, in commenting upon the fifth section of the last act in the case of *Moser* v. *Newman* (*a*), says, "on a review of the former statutes, when we see that words of relation have sometimes been introduced, and sometimes omitted, we must assume that such omission is intentional; particularly as the period of imprisonment, by which an act of bankruptcy may be constituted by lying in prison, is now limited to the short period of twenty-one days (*b*).

There is another rule, likewise, in the construction of statutes, namely, that penal statutes must be construed strictly as to words, but liberally as to the intent (*c*). That the 20*l.* per cent. chargeable under the 104th section is nothing more nor less than a penalty, appears from several cases. In *Beresford* v. *Birch* (*d*) *Lord Tenterden* says, "This interest at 20*l. per cent.* is in the nature of a penalty; you must declare specially, as for a penalty." So in *Ex parte Goldsmith* (*e*) the Vice Chancellor, in commenting upon the enactment on this subject contained in the former statute of 49 *Geo.* 3, c. 121, s. 4, says, "I am of opinion, that the fourth section, which gives 20*l.* per cent. against the assignee, is meant to apply, by way of penalty, against a solvent assignee only, and is not meant to prejudice

(*a*) 6 Bing. 556; 4 M. & P. 338.

(*b*) And see *Higgins* v. *M'Adam*, 3 Young & J. 10; and 1 Deac. B. L. 79.

(*c*) 1 Bl. Com. 88. (*d*) C. & P. 373. (*e*) 1 G. & J. 1.

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the creditors of a bankrupt assignee, and that the sixth section imposes the penalty upon the bankrupt assignee." It has been contended, however, that the 104th section is to be construed beneficially for creditors, because the 135th section declares the act shall be so construed. But the provision of that section does not apply to this case, in which the beneficial construction sought for is on behalf of the *bankrupt*, and not on behalf of the *creditors*. The way, too, in which we interpret the 104th section, is a construction *beneficial for creditors*. For if the money is retained by the assignee for a month, he will have to pay the whole 20*l. per cent.*, which will be more for the creditors than 20*l. per cent. per annum*. Therefore, as the words "*per annum*" were used in the former statute of the 49 *Geo.* 3, c. 121, s. 4, and are not used in the present enactment of the 6 *Geo.* 4, c. 16, which, as to this particular subject, is, to all intents and purposes, a *penal* statute, the omission cannot be supplied.

As to the second proposition, that the statute in this instance does not operate retrospectively, we contend that though the words "per annum" were even inserted in the clause in question, it would have no retrospective operation; for all the words of the 104th section are clearly prospective in their meaning—the expression is, if any assignee *shall retain*, not *shall have retained;* and the section goes on to enact, that the assignee *shall be* charged "for the time during which he *shall have* so retained or employed the same." Now if these words have any meaning, it is plain that the statute contemplated the *future* commission of the offence, and the continuing it after the passing of the act. There are also many other clauses of the statute

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which relate entirely to the future; as the 100th section, which provides that all forfeitures *shall be* divided among the creditors; and the 92d section, which enacts that the depositions *shall be* in certain cases conclusive evidence of the matters therein contained, and which last section has been determined in the case of *Key* v. *Goodwin* (*a*) to have no retrospective effect. [*Erskine*, C. J. Are not the strongest words in the 104th section, in the beginning of that clause, "if any assignee *shall retain*, &c.?] It may be observed also under this branch of the argument, that as the 6 *Geo.* 4, c. 16, entirely repealed all the former bankrupt laws, the question is, whether the words of the 135th section, reserving all rights and remedies *against the bankrupt*, do away with the repeal. It is clear, however, that they could not revive former penalties *against the assignees*. And it will appear from the case of *Ex parte Grundy* (*b*), that when a creditor has only an inchoate right, which was not completed before the passing of the act, he then does not come within the meaning of the 135th section; the right must be previously vested, if that section is to apply to it; and in this case no right to this 20*l.* per cent. had attached to the bankrupt, or any other person, previous to the 1st of September, 1825.

But, thirdly, the charge of 20*l.* per cent., whether on one gross sum, *or per annum*, is not intended for the benefit of the bankrupt, who has no real interest in it, either in respect of his allowance or his surplus. It is admitted, that though the bankrupt may not have an absolute immediate interest, yet if he shows a reasonable probability of an interest, the Court might be jus-

(*a*) 6 Bing. 582. (*b*) 1 Mont. & Mac. 293.

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tified in entertaining these petitions. But a petitioner must have some ground to stand upon, that is, some pecuniary interest, in such a case as this, to warrant his application to the Court; and this applies to bankrupts, as well as to other parties. Now all the statutes contemplate the retention of money by the assignees as an injury, not to the bankrupt himself, but to the *creditors*. Thus, the 5 *Geo.* 2, c. 20, s. 32 recites, that "assignees do oftentimes delay the dividing monies, to the very great prejudice of the bankrupt's *creditors*." And the 49 *Geo.* 3, c. 121, s. 4, which first imposed the charge of 20*l.* per cent., expressly refers to that section of the 5 *Geo.* 2. In the case of *Wackerbath* v. *Powell*(*a*) also, which has been so often referred to, the order made was, that the interest of 20*l.* per cent. should be paid for the benefit of the creditors. So by the 12th section of the 6 *Geo.* 4, c. 16, which enabled the Lord Chancellor to issue a commission against a trader, it is expressly declared to be "for satisfaction and payment of the *creditors* of the bankrupt." And by the 100th section, all sums of money forfeited under the act are also expressly directed to be divided amongst the *creditors*. The bankrupt, therefore, can have no immediate right to the charge of 20*l.* per cent., which is imposed as a forfeiture on the assignee. [*Sir A. Pell.* If the creditors are paid 19*s.* 6*d.* in the pound, is the whole of this forfeiture to go to the creditors?] Mr. *Montagu.* I should say, yes. It cannot go to the bankrupt in respect of his allowance, or his surplus; for the intent of the statute, in giving the bankrupt an allowance after paying 10*s.* or 15*s.* in the pound, is, to hold out a *bonus to him*, to induce him not to go on trading

(*a*) Buck, 509.

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till he exhausts his estate, but to be mindful of the interests of his creditors, by a timely declaration of his insolvency when he finds himself in embarrassments. The amount of the allowance, by section 129, depends upon the amount of the dividends paid out of the net produce of his estate, and not upon the amount of any penalties, whether imposed upon himself or others. Can it be said, that where the petitioning creditor forfeits his debt under the provisions of the 8th section, for receiving more in the pound from the bankrupt than the other creditors, this forfeiture is to enure for the benefit of the bankrupt? Again, the 38th section of the act imposes a penalty of £500 on a gaoler for suffering a bankrupt to escape, after being committed by the commissioners; and, according to the argument on the other side, this penalty would go to increase the bankrupt's surplus or allowance. [*Sir J. Cross.* There you would be met by the principle, that no man shall take advantage of his own wrong.] Yet the argument on the other side would introduce that monstrous absurdity. Another instance may suffice to prove this. The 120th section imposes a forfeiture of £100 on any person wilfully concealing the bankrupt's effects, together with double the value of the effects concealed. This penalty would, according to the principle contended for, go in augmentation of the bankrupt's allowance and surplus. Now it generally happens, that a concealment of this description is effected by the connivance of the bankrupt himself; so that the bankrupt would in this instance absolutely derive a profit from his own fraud.

With respect to the *surplus*, the words of the 132d section are, that the assignees shall declare to the

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bankrupt "how they have disposed of his *real and personal estate*, and pay the surplus, if any, to the bankrupt." If the penalties, therefore, which have been already alluded to, are not part of the bankrupt's estate, how can it be contended that this penal sum of 20*l. per cent.* forms part of it? In *Wackerbath* v. *Powell*(*a*), one of the questions that arose was, whether the 20*l. per cent.* was a specialty debt, or not. This would, of course, depend upon whether the assignees covenanted in the assignment from the commissioners to pay this 20*l.* per cent., or to make themselves accountable for it in any manner. Now in *2 Deacon's Bankrupt Law*, p. 195, where the form of the assignment is given, there is no covenant which can be considered as applying to this charge of 20*l.* per cent. Neither does the surplus include any accession of property, except what is derived from the bankrupt's own estate; for there are various descriptions of property which may be included in the audit of the commissioners, and be distributable under the commission, but which the bankrupt himself has no right to whatever. Thus, where the goods of a third person are seized by the assignees, as being in the order and disposition of the bankrupt as reputed owner,—the real owner of the property may, indeed, come against the bankrupt himself for the value of his goods, but they can never go to increase the bankrupt's surplus. And the same reasoning applies also to the case of a dormant partnership.

As to the purchase by the assignee of the debts of several of the creditors who have proved under this commission, such a purchase is not void, but only voidable. The *cestui que trust*, that is, the creditor whose

(*a*) 2 G. & J. 158.

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debt has been bought, may confirm the purchase, if he chooses; and if it is for his benefit, he may compel a specific performance. So, the purchase may be confirmed by the *laches* of the creditor. But whatever right the creditor himself may have to complain of this transaction, the bankrupt can have no possible interest in it. The debts bought would be neither more nor less after the purchase, than they were before; and the dividends payable thereon would be the same. Upon this ground, therefore, the petition of those who represent the bankrupt on this occasion can in no degree be sustained.

Mr. *Twiss* in reply. There can be no doubt of the petitioner's right to a *locus standi in curiâ*, upon the first petition; for they are entitled to ask for an account, whether there will be a surplus or not. This is quite independent of the claim they make to the 20*l. per cent. per annum*, under the second petition. But whether there would be a surplus or not, we could not know without an audit; and the substance of the first petition consists in the statement of the many evasions practised by the assignee, to prevent a meeting of the commissioners for this purpose.

With respect to the charge of 20*l. per cent. per annum*, which it is contended on the other side is a penalty, and that therefore a strict construction must be given to the 104th section, which imposes it,—we deny that it is a penalty. Now, a penalty implies punishment. And yet they say, whether the assignees keep money in their hands for two months or twenty years, this penalty will be the same. But this is a *bonus*, and not a *punishment*. We contend, that this charge is not even in the

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nature of a penalty, but only liquidated damages for the detention of the money by the assignees. The case of *Beresford* v. *Birch* (*a*) is not law. This is not a penalty for which an action of debt would lie, or for which a conviction is given before a magistrate, as in the 38th section of the act, which imposes a penalty on the gaoler for permitting the bankrupt to escape out of prison. [*Sir A. Pell.* In several clauses, where the act imposes a penalty as a punishment, it uses the word "forfeiture;" but this is not the case in the 104th section.] The word "forfeit" is used in the 45th section, which imposes a penalty of £200 on a removed assignee for not delivering up the bankrupt's effects to a newly appointed one. And the 100th section declares, that all sums of money *forfeited* under the act may be sued for in any Court of Record. The 104th section does not declare the money to be *forfeited*, but to be charged in account. [*Sir A. Pell.* In the 120th section, also, which imposes a penalty for concealing the bankrupt's effects, the word *forfeiture* occurs.]

The main question is, were the words "*per annum*" omitted purposely, or not? If they were, I admit the petition cannot be supported. But if those words were omitted accidentally, or if other words in the act will do as well, or if the legislature thought they had fully expressed their meaning of directing an annual computation,—then we are entitled to what we ask. They admit on the other side, that in sections 51, 57, and 105, though the words "*per annum*" do not occur, those words must be understood. And the same principle also applies to the 132d section, which gives interest to the creditors "at the rate of 4*l. per cent.*" in case of a

(*a*) 1 C. & P. 373.

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surplus. [*Sir A. Pell.* I observe, that the legislature, whenever they give more than 5*l. per cent.*, say a sum *equal to interest* at so much *per cent.*] The remedy given under the former act of 49 *Geo.* 3. c. 121. is not defeated by the 6 *Geo.* 4. c. 16; for by section 135, all remedies, which any person had under any commission then subsisting, are saved, except where otherwise directed. Up to September, 1825, when the last act began to operate, we were entitled to the charge under the former act. Since that period we claim either the sum of 20*l.* upon the gross sum, or 20*l. per cent. per annum*, under the 6 *Geo.* 4. c. 16. [*Erskine*, C. J. You could not be entitled to the arrears under the 6 *Geo.* 4, for the 104th section is clearly prospective.] We contend, that we are entitled to several years interest under the 49 *Geo.* 3, and to several subsequent years under the 6 *Geo.* 4; and that there is nothing of specific enactment in the last act to deprive us of this claim.

As to the last point, whether the *bankrupt* himself can claim this charge; it is said, that it does not go to the bankrupt, because by the 135th section of the 6 *Geo.* 4. it is declared that the act is to be construed beneficially for *creditors*, and there is no such provision in favour of the bankrupt. But the Court will not put one construction on the act for creditors, and another for the bankrupt, unless the bankrupt is expressly excluded from the benefit of the 104th section. With respect to the argument deduced from the 8th section, which imposes a forfeiture of the debt for a fraudulent composition with the petitioning creditor, and which has been one of the instances adduced on the other side, to show that the intention of the act was to give all penalties to the creditors—the

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bankrupt could in such a case have no claim to the money, because it was a *bonâ fide* debt owing from himself. So, where goods of a third person are in the order and disposition of the bankrupt, and the assignees seize them for the benefit of the creditors, we admit that the surplus does not in this case go to the bankrupt, but to the real owner of the goods. But we contend, that we have a right to all the surplus, after the claims of the crown and all equities against the bankrupt are satisfied. It has been decided in *Ex parte Lacey* (*a*), that where an assignee buys up debts, he is a trustee for the creditor until 20*s.* in the pound is paid, and afterwards for the bankrupt; and, therefore, the assignee must in this case account for the excess of the dividends above the amount paid by him for the purchase of the debts. And as the bankrupt would have had the benefit of the 20*l.* per cent. per annum, if the commissioners had charged it, he has an equal right to it by coming to this Court; for the charging it is not to depend upon the caprice of the assignee, but the assignee is expressly required by the act to make the charge. [*Erskine*, C. J. I understand the argument on the other side to be, that the bankrupt cannot claim this 20*l.* per cent. because it is not the *produce* of the bankrupt's estate; as it is not in the shape of interest, but only a sum chargeable on the assignees that is equal to interest. *Pell*, J. Does not the statute, when it gives this 20*l.* per cent., assume this to be the probable amount of the profit made by the assignee of the bankrupt's funds?] That, we contend, is the inference of the enactment; and, therefore, this sum must be considered as liquidated damages, as in the case of an increased rent payable by a tenant for ploughing up ancient meadow.

(*a*) 6 Ves. 625.

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Whose capital is it that the assignee has kept all this time in his hands? Whose can it be considered but as that of the bankrupt? And will any one say, that he is not to be reimbursed for the use and detention of his capital? But it is decided in *Wackerbath* v. *Powell*, that the charge is to go in augmentation of the aggregate fund of the estate. All the bankrupt's property is melted down into a general mass, and cannot afterwards be resolved into its original elements. And for the bankrupt to be told, that he shall not have anything but what his estate actually furnished to the assignee, and that he has no interest in any profit made by the assignee of the bankrupt's effects, seems to be quite contrary to the spirit and meaning of the Bankrupt Law.

Cur. adv. vult.

Erskine, C. J., after stating the various allegations and prayers of the original and supplemental petitions, proceeded as follows:—The principal question arising out of these petitions is contained in the prayer, that in the account to be rendered by the assignee to the petitioners, the assignee may be charged interest at the rate of 20*l.* per cent. per annum, upon the balance from time to time retained in his hands.

The petitioners must be considered as standing in the place of the bankrupt; for although one of them is stated to be a creditor, the petition is not presented by him in that character, but merely in that which applies to both the petitioners, namely, as assignees of the bankrupt under the Act for the Relief of Insolvent Debtors. The petitioners, therefore, claim to have this account rendered, and the charge made in the assignee's accounts; first, in respect of the interest which the

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bankrupt has in the surplus; secondly, in respect of his allowance. For they say, that if this charge be made in the account, there will be assets to pay all the creditors 20*s.* in the pound, and to leave a surplus, which they (as the assignees of the bankrupt under the insolvent act) will have a right to apply to the discharge of his debts incurred subsequent to the commission. And they further contend, that even if there should not be a surplus, there would be enough to pay a dividend of 10*s.* in the pound; and in that case the bankrupt would be entitled to an allowance, upon which they should have a similar claim.

The commissioners, in auditing the bankrupt's accounts before declaring a dividend, have allowed 20*l.* per cent. upon the monies in the hands of the assignee, for the whole period of thirteen years, during which they have been retained. Whereas the petitioners assert, that according to the fair construction of the statute they ought to have charged thirteen times that sum, or 20*l. per cent. per annum.*

The question arises upon the construction of the statute of the 6 *Geo.* 4. c. 16. s. 104, whereby it is enacted, "that if any assignee shall retain in his hands, or employ for his own benefit, &c., any sum to the amount of 100*l.* or upwards, part of the estate of the bankrupt, &c., every such assignee shall be liable to be charged in his account with such sum as shall be equal to interest at the rate of 20*l.* per cent. on all such money, for the time during which he shall have so retained or employed the same," &c. Now, before it can be of any importance to decide whether the 20*l.* per cent. is to be charged annually, or only once, it will be right to see whether the petitioners have any interest in this

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question; for if they have no interest in the result of our decision, they can have no right to call for it. And therefore the first question is, has the bankrupt any right to insist upon having this sum charged in the account *with him*, for the purpose of creating a surplus, or founding his claim to an allowance?

Whatever claim the bankrupt may have, must rest on the 128th and the 132d sections of the Bankrupt Act. By the 128th section it is provided, "that every bankrupt, who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission 10*s.* in the pound, shall be allowed 5*l.* per cent. out of such produce;" and he is to receive further allowances in proportion to the amount of the dividend that may be paid. The 132d section provides, "that the assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of *his real and personal estate*, and pay the surplus, if any, to such bankrupt." Under both sections the question resolves itself into this:—Would the 20*l.* per cent., if it had been charged in the account upon which the dividend was declared, become thereby a part of the bankrupt's estate, under the 128th section, so as to bring any residue of that charge within the words "net produce of the bankrupt's estate"? Or, would it form part of the bankrupt's real and personal estate, under the 132d section? Or, could the bankrupt in any way insist upon the charge being introduced into the account *with him*, under that section?

The counsel for the petitioners first insist, that the 20*l.* per cent. is to be taken as the assumed amount of the produce of the funds retained by the assignee, which has been assessed by the legislature; that it

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forms part of the bankrupt's estate as an increment, in the same way that the charge of interest at the rate of 4*l.* or 5*l.* per cent. (for which they say it is substituted) would have been; and that it therefore comes within the letter and the spirit of the enactment. If I could see the 104th section in that point of view, I should admit as a necessary consequence, that the charge ought to form an item in the account, by which the allowance would be regulated, and the surplus ascertained. But the intention of the legislature, in fixing so high a rate of charge, appears to me to have been, not to assess the profit assumed to have been made by the assignee by such retention, but to fix a sum beyond any supposable profit, and to attach the liability to the charge by way of *penalty*, in order to deter the assignee from employing, and thereby putting in risk, the money appropriated to the payment of the creditors, instead of depositing it with the bankers chosen by them. Looking also at the entire statute, and at the scope and object of the bankrupt laws,—the interests of the *creditors* appear to have been alone contemplated, in the introduction of this clause. It is in the accounts by which the dividends are regulated, that the commissioners are authorised to charge the 20*l.* per cent.; and it seems to me that in *those* accounts, and for the purposes of *dividend*, only, can the amount of such charge be introduced as an item.

In order that we may have a clear understanding of the intention of the legislature, as to the application of the money so charged, it is necessary to keep in mind the principal end and object of the bankrupt laws; which, dealing with the bankrupt as an insolvent, have been mainly framed with the view of sharing equally

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amongst the creditors the consequences of such insolvency, whether arising from misfortune or misconduct, and of protecting them from the frauds of the bankrupt, and the neglect of those to whose hands the wreck of his estate might be entrusted for distribution. The protection of the general body of the creditors, and the mitigation and equalization of their losses, are obviously the main objects of almost every enactment in bankruptcy; as may be seen by a reference to the 13 *Eliz.* c. 7. s. 6. 7. 8; 1 *Jac.* 1. c. 15. s. 12; 21 *Jac.* 1. c. 19. s. 11; and 5 *Geo.* 2. c. 30. s. 1. 18. 21. 24. 29. 30. But the legislature, not overlooking those cases in which a trader is frequently prevented from meeting his commercial engagements by temporary pressure,—although in possession of or entitled to property more than sufficient eventually to satisfy all just demands,—has provided for the restoration to him of the surplus of *his own property*, when his creditors have been fully indemnified. But the clear policy of this provision, founded on strict justice, looks to the fact of the bankrupt's own estate being sufficient to meet the demands upon it, and could never contemplate the case of a man becoming the *gainer* by his own insolvency, because by the misconduct of others his creditors had been delayed, or the payment of their debts put in peril. A similar principle is recognised in the provision made for a bankrupt's allowance, which is intended as a reward and encouragement in proportion to the product of his property; and a stimulus is thus applied to his exertions to assist his creditors in recovering as much of it as possible. But the policy of this provision as little contemplates the bankrupt gaining by the dishonesty or the negligence of others, as that made for the

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surplus. Looking therefore at the question, upon general principles, as well as upon the wording of the clauses under which the surplus and allowance are given, the claim of the bankrupt to have this charge of 20*l.* per cent. entered in *his* account with the assignee, seems to me to be untenable.

But if we look a little more closely into the structure of the act of parliament, the unsoundness of the claim will be more obvious. The petitioner's claim is for 20*l.* per cent. for every year during which the assignee has retained the money in his hands, that is, from the year 1818. Now the statute of 6 *Geo.* 4. c. 16. only came into operation on the 1st September, 1825. Unless, therefore, the 104th section of that act has a retrospective operation, the power to charge the 20*l.* per cent. in the assignees' account with the bankrupt, must be sought for in some earlier statutes. But upon looking at the statute of 6 *Geo.* 4. c. 16. s. 104, it is impossible to give to that enactment a retrospective effect; and this was not contended for at the bar. But it was urged, that the 20*l.* per cent. might be charged, in respect of the retention from 1818 to 1825, under the 4th section of the statute of 49 *Geo.* 3. c. 121; such being, as they contend, one of the remedies preserved by the 135th section of the 6 *Geo.* 4. c. 16. Let us therefore consider the provisions of the former statute of the 49 *Geo.* 3, in which this 20*l.* per cent clause was first inserted. And I think it will be clear, from the language of that statute, and the alterations then introduced, that the legislature at that time did not intend that the money to be so charged should form a part of the bankrupt's estate, or be applicable to any other purpose than to the payment of the creditors. The 3d section adopts the provision

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made by the 32d section of the 5 *Geo.* 2. c. 30, authorizing the creditors to appoint bankers for the safe keeping of the bankrupt's estate. The 5th section provides for the rendering of the assignees' accounts, and the declaration of the dividend by the commissioners; but instead of pursuing the language of the corresponding section of the former statute of 5 *Geo.* 2, it makes a material alteration. The 33d section of the statute 5 *Geo.* 2. c. 30, after requiring the assignees to produce fair and just accounts, directed the commissioners " to order such part of the *neat produce of the bankrupt's estate,* as by the said accounts, *or otherwise,* should appear to be in the hands of the assignees, &c. to be forthwith divided." The 5th section of the 49 *Geo.* 3. c. 121, instead of adopting this language, enacts, " That, for the purpose of ascertaining in what manner the money which shall from time to time come to the hands of such assignees has been employed, the commissioners shall in no case declare a dividend upon admission only of a certain sum in the hands of the assignees, but shall require such assignees to deliver upon oath a true statement in writing of all the sums of money received by such assignees, and when received by them respectively, and on what accounts, and how employed, and shall examine such statement, and compare the receipts with the payments, and ascertain what balances have been from time to time in the hands of such assignees; and shall inquire for what reason any sum appearing to be in the hands of such assignees ought to be retained, and thereupon shall declare a dividend *on the remaining sum.*"

Why was this change of expression adopted by the legislature? Because, as it should seem, the new pro-

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vision had been introduced into the antecedent clause, whereby sums of money might be charged in those accounts, which, though intended to be divided amongst the creditors, would not strictly come within the words "neat produce" of the bankrupt's estate. For in the 4th section was introduced, for the first time, the charge upon the assignee of 20*l. per cent. per annum*, for retaining the money belonging to the estate in his hands; whereas the provisions for the allowance, and for the surplus out of his own estate, were left as previously enacted in the statute of the 13 *Eliz.* and the 5 *Geo. 2.* In the 13 *Eliz.* c. 7. s. 4, it is declared, "that such of the commissioners as shall put the commission in execution shall, upon lawful request to them made by the bankrupt, not only make a true declaration to the bankrupt of employing and bestowing of his lands and goods, &c., but also make payment of the overplus *of the same*, if any such shall be, to the bankrupt." The 5 *Geo. 2.* c. 30. s. 7. enacts, that the bankrupt "shall be allowed the sum of 5*l.* per centum out of the *neat produce* of all the estate that shall be recovered in and received, which shall be paid unto him by the assignees, in case the *neat produce* of the said estate, after such allowance made, shall be sufficient to pay the creditors the sum of 10*s.* in the pound." Under this statute of the 49 *Geo. 3*, therefore, the dividends are clearly to be paid out of the balance stated in the accounts audited by the commissioners; and in those accounts alone are the commissioners authorized to make the charge of 20*l.* per cent. The allowance and the surplus are, by the language of the statute, as by the policy of the bankrupt laws they ought to be, made to depend upon the produce of the bankrupt's own estate.

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I am therefore clearly of opinion, that under the 49 *Geo.* 3. c. 121 the petitioners could have no claim upon any fund created by the charge of 20*l.* per cent. even if the commissioners' power to make such charge had been preserved by the 135th section of the stat. 6 *Geo.* 4.

If the petitioners then have any claim at all, it must take its commencement from the 1st September, 1825, when the statute of the 6 *Geo.* 4. c. 16. commenced its operation; the 107th section of which statute orders the dividends to be paid out of such part of the *net produce of the bankrupt's estate* in the hands of the assignees, as the commissioners shall think fit. The wording of this clause occasioned at one time considerable doubt in my mind, before I had accurately compared it with the former statutes. For, as there was no express direction in the 104th section, that the 20*l.* per cent. should be divided amongst the creditors, and there were no general directions applicable to the appropriation of this sum,—unless it could be brought within the words "net produce of the bankrupt's estate" in the 107th clause, it seemed to expound the intention of the legislature to attach the charge by way of increment to the bankrupt's estate, and if so, to lead to the consequences contended for by the petitioners, namely, that as such it would be applicable to the purposes of allowance and surplus, as well as of dividend. But as it is still obvious, from the consecutive arrangement of the clauses, and the order of the matters to be done in pursuance of those clauses, that the dividends were to be regulated by the state of accounts so audited by the commissioners; and it is equally obvious, that there must be a remoulding of *that* account, for the purpose of settling the bankrupt's surplus,—because

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many items might find their way into the dividend account, which undeniably could not be admitted into the bankrupt's surplus account,—such as the forfeitures incurred by the bankrupt's own misconduct, the property of dormant partners left in the order and disposition of the bankrupt, and other matters pointed out in the argument at the bar; and as no provision is made for the auditing by the commissioners of such account rendered to the bankrupt, and no opportunity therefore is afforded for making the charge of 20*l.* per cent. in *that* account; a reference to the original clauses in the other statutes, and a careful observation of the object of the 104th clause, and above all, reference to the general policy of the bankrupt laws, have outweighed the inference suggested by the wording of the 107th clause, and bring my mind to the same conclusion upon the petitioner's claim under the statute of 6 *Geo.* 4. c. 16, as that which I have already explained with reference to the 49 *Geo.* 3. c. 121. And I am therefore of opinion, that no part of the per centage, even if it were annual, could be claimed by the bankrupt, or his representatives, as part of his estate.

But it was urged at the bar, that although the charge of 20*l.* per cent. might not be available, as the assumed profit of the bankrupt's estate in the hands of the assignees, it might nevertheless be claimed as liquidated damages for the wrong committed by the assignee in the misemployment of those funds, in which the bankrupt had, at least, a possible interest. But, passing by for the present the objection, that as liquidated damages the charge could form no part of his estate, to the surplus of which alone the statute gives him any claim,—there is this further objection, viz. that before a party

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can claim damages, he must shew some injury done to *himself*. Now, unless the bankrupt can shew that in point of fact there was a surplus at some given date, he makes out no case of possible injury or wrong done to him; he would lose nothing by the delay; he had no interest that could be put in peril by the retention or misemployment of the funds; and therefore the facts of the case do not afford a foundation for this argument; which, even if a probable surplus (independant of the charge) had been made out, would not, in my opinion, have entitled the bankrupt to demand, or enabled the Court to impose, the addition of such a charge to his account.

If therefore the petitioners take an order for an inquiry into the state of the account, as between the bankrupt and the assignee, they must take it, without any direction to the commissioners to make the charge of 20*l.* per cent.

Such being my opinion, it becomes unnecessary to say any thing upon the propriety of the charge, as made by the commissioners; for whether it is to be once, or for every year, is immaterial to the question upon which my judgment rests. And I shall forbear from volunteering an opinion on a point not calling for the expression of my judgment.

As to the other part of the prayer, the petitions must in my judgment be dismissed.

As to the prayer for discharging the order of the 14th of June, for superseding the commission of the 16th June, and for ordering payment of the costs incurred by the issuing of the commission of the 4th of March, although I strongly disapprove of the conduct of the Messrs. *Husbands* in many particulars connected

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with the issuing of the last commission,—yet as it is a valid existing commission taken out by the parties entitled to renew the original commission, and the petitioners have failed to show that the commissioners named are unfit to be entrusted with the powers committed to them, I see no ground for the prayer that it should be superseded. And I cannot but think, that the course adopted by the petitioners, in procuring the commission of the 4th March, was, to say the least of it, highly irregular. If they felt that the assignee had misconducted himself, and was an improper person to be entrusted with the management of the estate, and the working of the commission, they ought to have brought their complaint at once before the Lord Chancellor, after notice to the assignees, and have taken his lordship's directions for winding up the bankruptcy. But, for the bankrupt, or his representatives, with interests hostile to those of the great body of the creditors, for whose protection the original commission issued, to sue out a renewed commission, naming their own commissioners without notice to the assignee or solicitor under the original commission, strikes me as a most irregular proceeding, if not illegal and void. And the petitioners have no right to cast upon the creditors the burthen of the costs of their own wilful irregularity.

Whatever may be the legal effect of any arrangement made by the assignee with any of the creditors for the purchase of their debts, it is premature to require any directions upon the subject, until, upon rendering the account to the bankrupt, it is seen what dividends are retained by the assignee in respect of such debts, and what interest the bankrupt has in disputing the

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payment. For if, upon taking the account, it should appear that there would be no surplus,—even if the assignee were only to repay himself what he gave,—it would be for the other creditors, and not for the bankrupt, to question the right of the assignee to retain any larger amount. The bankrupt could have no ground for complaint in respect of his surplus; and it never could be a question in regard to his allowance,—for the very proposition assumes, that his estate has not paid all his creditors 10*s*. in the pound.

If, therefore, the petitioners are still desirous of investigating the accounts, under the stipulations assented to by the respondents during this discussion, the Court will acquiesce in such arrangement, reserving the question of costs till the result of the inquiry be known. Otherwise, the petitions must be dismissed, and the usual consequences must, I fear, attach; though, if the original petition were now before the Court, I should have required a much more satisfactory explanation of the delay, before I would have consented to have relieved the respondents from the burthen of bearing their own costs.

Sir A. Pell.—This very singular case, so entangled in its facts, and so novel as to the legal question to be decided, has received from all the judges a calm and patient discussion. It is certainly a case of the utmost importance to the public; and, with some inconvenience, I fear, it will be necessary for me to go somewhat at length into the explanation of the grounds on which my judgment is founded.

The first question to be decided is, what is the proper construction of the 104th section of the 6 *Geo.* 4. c. 16. It is contended by the respondents, that the

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charge of 20*l.* per cent. can only be on the *gross sum* kept in the hands of the assignee; while the petitioners insist, that the charge should be 20*l. per cent. per annum*. And I am now to deliver my humble judgment on the truth of either of these propositions. I feel myself bound to say that the weight of my opinion is, that an assignee, who illegally keeps money in his hands, is chargeable with 20*l. per cent. per annum* upon the whole sum retained, and during the whole period of his so retaining it. But opinions ought not to prevail, unless they are founded on reason. I must, therefore, see what the law was on this subject before the statute of the 6 *Geo.* 4. c. 16.

I am bound, I apprehend, as a Judge, to look not to the words merely of an act of Parliament, but to the grievance which the legislature intended to redress, and the remedy which it intended to apply. Now, what was this grievance? That assignees had been in the practice of using for their own purposes large sums of money which came to their hands, and had delayed making a dividend, as it was their duty to do, amongst the bankrupt's creditors. To provide a remedy for this grievance, the 5 *Geo.* 2. c. 30. s. 31, for the first time required that bankers should be appointed by the general body of the creditors, with whom the money collected by the assignees should be deposited, until a dividend was made of the bankrupt's estate. But there was no provision for the breach of this enactment, until the 49 *Geo.* 3. c. 121. s. 3. enacted, that "if the assignees wilfully retain in their hands, or employ for their benefit, any monies, part of the estate of the bankrupt, contrary to the direction of the creditors or commissioners, they shall be charged in their ac-

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counts with the estate of the bankrupt, with such sum as shall be equal to the amount of interest, computed at the rate of 20*l. per cent. per annum* on the sums, and for the time during which they shall have so retained or employed them;" and the commissioners are required to charge the assignees with such sums in their accounts.

This act continued in operation until the 5 *Geo.* 4. c. 98, when the enactment in question underwent some alteration in the wording, but in substance the provision remained the same. Therefore, up to that time, assignees were so chargeable with 20*l. per cent. per annum* upon money improperly retained in their hands.

Then comes the 6 *Geo.* 4. c. 16, in which I admit the words "*per annum*" are not inserted. But notwithstanding this omission, the substance of the enactment is still the same; for can any reason be assigned, why, in the interval between the 49 *Geo.* 3. and the 6 *Geo.* 4, the evident intention of the legislature should have been changed, as to the protection afforded to creditors against the misconduct of the assignees? According to one reported case, indeed, of *Ex parte Bray* (*a*), the words of the 49 *Geo.* 3. c. 121. were considered so imperative, that an assignee who retained money in his hands only for one hour, and even for a meritorious purpose, has been held liable to the charge of 20*l.* per cent. per annum. In that case the money would actually have been lost, if it had been paid into the banker's, pursuant to the order of the commissioners. I wish to speak of any decision of my Lord *Eldon* with the most profound respect. But looking at that case, and finding as I do, that the assignee acted, not only *bonâ fide*, but with the most meritorious inten-

(*a*) 1 Rose, 144.

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tion,—and when I consider, that the words of the statute are "*wilfully* retain or employ for their benefit"—I cannot help saying, that to my mind it does seem an extraordinary judgment. In consequence of this decision, perhaps, there was a slight alteration in the wording of the 5 *Geo.* 4; but it does not in any way affect the principle of the former enactment.

I have been much struck, through the whole argument, with the constant endeavour of the counsel for the respondents to introduce the word *penalty* into this discussion; and certainly the judgment of the Vice-Chancellor seems to be founded on the notion, that this charge of 20*l.* per cent. was to be considered as a *penalty* on the assignees; but, with all respect for him, I confess I cannot so consider it, according to the fair and reasonable construction of the act.

There have been various positions laid down in the argument, as to the rules of construction of acts of parliament; but some have not been mentioned which I will now refer to. Courts of law say, you are not to look to the letters or words of a statute, but what was the particular grievance to be redressed, and the remedy to be applied. In the case of *Mitchell* v. *Torup*(*a*) it is laid down, that in expounding acts of parliament, where words are expressed plain and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the act by reason of some subsequent clause, from whence it might be inferred the intent of the parliament was otherwise; and that holds with respect to *penal*, as well as other, clauses. The same doctrine is to be collected

(*a*) Parker's Rep. 233.

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also from *Moore* v. *Hussey* (*a*), and *Stoker* v. *Zouch* (*b*). Therefore the objection so much pressed upon us by the respondents in the argument, as to the construction of *penal* statutes, vanishes, if these authorities are to be still regarded. But what is the language of Mr. Justice *Buller*, in the case of the *King* v. *Hodnett*? (*c*) "It is not true," he says, "that the Court, in the construction of penal statutes, are to narrow the construction. We are to look to the words in the first instance, and where they are plain, we are to decide on them; if they are doubtful, we are then to have recourse to the subject-matter; but, at all events, it is only a secondary rule." So in the case of the *Attorney-General* v. *Sudell* (*d*), upon a question relating to the law of simony, where it was urged that the law was *penal*, and not to be aided in a court of equity, Lord-Keeper *Wright* said, "though this be called a penal law, yet this Court will aid remedial laws, not by making them more penal, but to let them have their course." The same doctrine is also laid down in the 1st *Institute*, 381, where Lord *Coke* says, "acts of parliament should be construed *ex visceribus*, so as to work no wrong, and so as to suppress the mischief and advance the remedy."

After these authorities, I think it is rather late in the day to assume that this is a case of penalty, and then, because it is a case of penalty, to put a special construction on the act, regardless of those sound principles laid down for our guidance by so many enlightened judges.

Qui hæret in literâ, hæret in cortice.

(*a*) Hob. 93. 97.
(*b*) Plowd. 365.
(*c*) 1 T. R. 101.
(*d*) Prec. in Chan. 215.

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But the doctrine that has been contended for, of construing a *penal* statute differently from one not penal, is really so untenable, that even in a case where life itself was in question, it was held, that the strict letter of the law should not prevail against the more reasonable construction of the act. The case I mean occurred in the 19 *Hen.* 6, and is to be found in *Plowden*, p. 86, edit. of 1816. A man was convicted on an indictment for killing his Master's wife, upon the statute of 25 *Edw.* 3, by which it is declared, that if a servant kills his master it is treason; and the question was, how he should be executed, whether he should be hanged as a felon, or drawn and hanged as a traitor; and it was adjudged, "by the advice of all the justices, that he should be drawn and hanged, because it was treason;" and it was said, "that it was not taken as within the equity of the statute, which speaks only of killing his master, but is rather within the words of the statute, for master and mistress are the same thing in effect." As penal statutes, therefore, may thus be construed, it is surely not an unreasonable construction of the act in question, to say that the words "*per centum*," coupled as they are with the other words in the 104th section, are the same in effect as "*per centum per annum*."

But the ordinary acceptation of terms, also, may be safely applied in construing acts of parliament. And I am borne out in this position by what is said in the case of *Shepherd* v. *Gosnold, Vaugh. Rep.* 169. "Where the penning of a statute is dubious, long usage is a just medium to expound it by; for *jus et norma loquendi* is governed by usage; and the meaning of things written or spoken must be, as it hath constantly been received by common acceptation." Now, in com-

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mon parlance, when a man talks of interest at *5l. per cent.*, does he not mean *5l. per cent. per annum?* And the statute in question speaks merely of *5l. per cent.*, in the clause (*a*) imposing a penalty for concealing the bankrupt's effects, and in various other clauses, where the words "*5l. per cent.*" are clearly synonimous with *5l. per cent. per annum.* Let us take, however, the words of the clause itself. If the construction of the respondents be the right one, then the clause might have stopped at the words "*20l. per cent*;" but these important words are added, "on all such money, *for the time during which* he shall have so retained or employed the same." Now these words are useless, if the assignees were to be charged merely on the gross sum retained, and not during the whole time of its retention. But what is the effect of the construction contended for? Mr. *Montagu* was driven to this admission, when I put a question to him in the course of the argument, namely, that whether the assignee kept the money only for a single day, or for 20 years, he was still chargeable with no more than *20l. per cent.* on the gross sum retained. Can any thing be more extragavant, than to say that the provision is the same for the retention of the money for one day, as for an enduring offence of 20 years? This is repugnant to every principle of justice, which apportions the punishment to the offence. It comes home indeed to every man's reason to acknowledge, that he who keeps my money for 20 years against my will, is more criminal, than he who merely keeps it for a day. And it is therefore my opinion in this case, that the assignee shall be charged in proportion to the time he has kept the creditors' money in his hands.

(*a*) Section 120.

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Before the introduction of the clause on this subject in the 49 *Geo.* 3. c. 121. the practice was, that where an assignee had improperly kept or misused the monies belonging to the estate, the Lord Chancellor was accustomed to charge him with 4*l.* per cent. in some cases, and where the assignee had done this for his own profit, he was charged 5*l.* per cent. That mode of charging the assignee, however, being insufficient to correct the abuse, the 49 *Geo.* 3. c. 121. s. 3. imposed the charge of 20*l. per cent. per annum*, and then came the 6 *Geo.* 4. c. 16. s. 104. to which I give the same construction. For mark what the consequence would be, upon any other construction. Here is property kept by the assignee from 1817 to 1830 or 1831. He is chargeable with 20*l. per cent.*, we will say, upon the gross sum. But then, according to that computation, the consequence is, that the assignee only pays 2½*l.* per cent, when he must have paid 4*l.* or 5*l.* per cent. if Sir Samuel Romilly's act had never passed. This fixed my mind on the point. For, if we were to put the construction contended for on the 6 *Geo.* 4. c. 16. s. 104, then, instead of a remedy, it would be promoting the very grievance which the legislature intended to redress.

But it is said, that the bankrupt has no interest in this question. I have heard not only here, but at the bar before I left it, a language used with regard to bankrupts, which I could never agree to. I apprehend, that all the statutes in bankruptcy have been made for the protection of the bankrupt, as well as of the creditor; for they propose to clear the honest but unfortunate trader, from his difficulties, as well as to divide his property among his creditors. Indeed I never did think,—and the impression of my mind is now most

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strong on the subject,—but that where a bankrupt honestly and fairly submits himself to his commission, he is as much entitled to security and protection, as any of his creditors.

Before I proceed, however, I must refer to one more authority, in support of my opinion on the construction of the 104th section, which goes home to the very proposition I have laboured to maintain; it is an opinion of my Lord *Eldon*, who is entitled to as much respect as any judge who ever sat in Westminster Hall, and is to be met with in a case, where he had this very clause before his eyes; and let it be remembered, too, that he is the same judge who pronounced the decision in *Ex parte Bray* (*a*). In *Ex parte Wackerbath*, he says, "I believe there is no other statute which requires attention upon the subject, except the last statute (6 *Geo.* 4. c. 16,) which adopts in substance the words of the former statutes, as to directing where the monies arising from the bankrupt's estate shall be deposited; and there is a power given to the commissioners, to direct that the money should be invested in Exchequer bills, which existed likewise in the former statute, but in a more restricted form. Then follows the section enabling the commissioners to charge the assignee in account with the 20*l. per cent.*, *as in the former statute*." Now Lord *Eldon* must have had the 49 *Geo.* 3. c. 121, as well as the *former statutes* before him, or present to his memory, at the time of making this observation; and yet he plainly says, that the words "20*l. per cent.*" are the same as those in the former statute; though he could not have failed to remark that the words "*per annum*" were omitted in the 6 *Geo.* 4. c. 16.

(*a*) 2 G. & J. 158.

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But this brings me to the second question in this case. It is contended that, admitting the construction I have put upon the act to be correct, the charge is nevertheless one in which the bankrupt has no interest. That appears I confess an extraordinary proposition. Suppose there was no statute whatever on the subject, and that the Lord Chancellor had charged the assignee with 4*l.* per cent., for retaining money in his hands, and that by means of this charge a surplus had been created,—I should like to know, who is to have the benefit of this? Can any one but the bankrupt be entitled to this surplus, constituted as it is of that fund of which his property formed a part? I may refer on this head to the cases of *Treves* v. *Townshend* (*a*), *Ex parte Lane* (*b*), in the matter of *Hilliard* (*c*), and *Hankey* v. *Garret* (*d*), which appear to favour the opinion I have already expressed. The advantage made of this money by the assignee is surely part of the bankrupt's estate. Words have been pressed into this case more than things. It has been said, that after the assignment to the assignees there is no longer any estate of the bankrupt. I deny this position. For all the acts of parliament, and every case upon the subject, treat the property most distinctly, as the estate of the bankrupt, subject only to the claims of the creditors; and the bankrupt continues to have this qualified right to it, until all the affairs are wound up. This is clear from the cases of *Ex parte Archer* (*e*), *Ex parte Rooth* (*f*), and *Ex parte Langford* (*g*). What does

(*a*) 1 Brown, 384.
(*b*) 1 Atk. 90.
(*c*) 1 Ves. jun. 89.
(*d*) Ibid. 236.
(*e*) 2 G. & J. 110.
(*f*) 1 G. & J. 158, n. (*a*).
(*g*) Ibid.

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the Vice-Chancellor say in *Ex parte Archer?* "It is true, that to support an application of this sort, the bankrupt must shew that he has at least an apparent interest; in the present case, I think that he has not only an apparent, but a certain interest." That was a case, indeed, where there was an actual surplus; but if the construction of the act, to charge 20*l. per cent. per annum*, is the right one, there will here also be a surplus to which the bankrupt will be entitled. And even by directing the account to be taken against the assignee, with the mere charge of 20*l.* per cent. upon the gross sum, the commissioners have already given a benefit to the bankrupt. But then it was said by the Vice-Chancellor, in the report of his judgment on the hearing of the first of these petitions, that as the amount of dividend was less than 10*s.*, the bankrupt could not upon any computation be entitled either to allowance or surplus. This, however, turns entirely upon the limited construction of the statute; for on the other construction, there would be sufficient to pay all the creditors 20*s.* in the pound, and leave a surplus. Then, why should the bankrupt be said to have no interest in this surplus? He had an interest in the former charge of 4*l.* or 5*l.* per cent., that was made on the assignees for the retention of money in their hands; and there seems to be no reason, why he should not have the same interest in the present charge of 20*l. per cent.* For if otherwise, it would be a *bonus* held out to an assignee to keep the bankrupt's property in his hands without dividing it. It was called, I think fairly enough, by the counsel for the petitioners, *liquidated damages;* for the legislature has in effect said to assignees, if you keep the bankrupt's property, we will

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assume that you have made a profit of it to the extent of 20*l. per cent. per annum*, and therefore we will charge you with that sum in account.

But then it has been urged, that in the case of a penalty of 500*l.* (*a*) imposed on a gaoler for permitting a bankrupt to escape out of prison, the bankrupt would clearly have no right to any share in this penalty. There will be time enough to determine that question when it occurs. At present, it is sufficient to say that this is *not* a penalty. But supposing the mere charge of 20*l.* per cent. on the gross sum retained by the assignee was to produce a surplus, after paying the creditors 20*s.* in the pound, I wish to know who is to have the benefit of this sum. If it is to be considered a penalty, it cannot go back to the assignees. Then, is it to go to the crown? The crown would, I am sure, disclaim to receive money obtained under these circumstances. It must therefore belong only to the bankrupt, by the use of whose money such surplus has been created.

It has been contended, however, that the 104th section is not retrospective. But I say, that the 4th section of the 49 *Geo* 3. c. 121, giving 20*l. per cent. per annum*, is brought down by the 6 *Geo.* 4. c. 16, and is, in substance, adopted by that statute in the fullest manner. By the 135th section of the latter statute it is provided, that nothing in that act shall affect or lessen any remedy which any person has, except where the alteration is expressly declared, that is, by specific enactment. Now, is there any specific enactment to alter the former practice, as to the charge of 20*l. per cent. per annum.* In *Ex parte Grundy* (*b*) a retro-

(*a*) See 6 *Geo.* 4. c. 16. s. 38. (*b*) Mont. & M. 293.

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spective effect was given to the 56th section of the act, much stronger in degree, than the present case would admit of. In the case of *Kay* v. *Goodwin* (*b*) Chief Justice *Tindal* thus expresses himself. "It is said, that there are several cases in which the construction of this act of parliament has been, that it should apply to commissions which had been issued, and were then in the course of operation. That may be the case, when the law has been altered *in general terms,* or old provisions are re-enacted. Such a general alteration of the law will apply, as part of the law of bankruptcy, to commissions issued before the new law; but when new provisions are introduced which apply to particular cases, and give entirely new remedies, we must look at the very words of the sections, to see whether they apply or not to by-gone and then existing commissions." Now, the question here is, whether this is not an old provision that is retained by the section 135; and I say, that the 104th section is no new enactment, but merely the provision of the old statute kept alive. Therefore it appears to me, that the assignee in this case ought to be charged with the 20*l. per cent. per annum,* and that the petitioners have made out their case, as to the bankrupt's interest in this charge.

As to the general facts of the case, I do not know how it is, but my mind is so constituted, that I cannot but lend a willing ear at all times to a petition for an inquiry, where the law has been sought to be evaded; though I do not say, that where a party has no legitimate interest in the question, he can come into a Court of justice to demand such inquiry. But I think, that the bankrupt has in this case a right to ask

(*a*) 6 Bing. 584.

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for the interposition of the Court. Those who represent the bankrupt on this occasion are certainly not entirely clear of blame. But if the petitioners wish to go on and will give security for costs, I think there ought to be further inquiry. What injury can this do to any one? I would give the bankrupt the benefit of this offer, though he is not wholly blameless in these transactions. The commission issues against him in 1817, and though it is alleged in the petition, that *Husband* the assignee received large sums of money in 1818, yet no step is taken by the bankrupt, or those who represent him, until the year 1831. How does it happen, that the bankrupt laid by so long, and that if he had any cause for complaint, or any right to enforce against the assignee, he did not come earlier? In that respect I think he was wrong; but "that is the head and front of his offending." It is clear, however, that the assignee has misconducted himself; for it has been found by the commissioners, that he improperly retained the money from 1817 to 1831; and they charge him with 5*l. per cent.* on one sum, and the greater per centage, viz. 20*l.* per cent. upon the other.

I never saw such an assemblage of facts as there are in this case, to induce my mind to come to one plain irresistible conclusion, and that is, that the assignee throughout these transactions was wilfully holding back. A contest takes place between the assignee and the petitioners, as to which party is to have the renewed commission. Are we to be told then, whoever gets the renewed commission, that that commission is mere waste paper, notwithstanding the assignee has adopted and acted upon it? The days fixed for the meetings were the 19th & 20th of May, and only two Commissioners

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appear. Mr. *Rodd* was in Plymouth, but did not attend. This is altogether very strange, if we are to give credit to some of the expressions sworn to in one of the affidavits; and I must confess leads my mind to think, that the truth was Mr. *Rodd* did not wish the proceedings to go on; for he says "he was not inclined to act as a commissioner under the commission." It is sworn by Mr. *Cole*, that *Husband* said "he had given him work to do for 12 months, without meddling with him in *Aaron's* affair." But the case does not stop here. What took place at the meetings in June? The assignee and his solicitor go previously before the Lord Chancellor, and get another renewed commission, without any notice to the bankrupt or the petitioners; so that only one commissioner was present at these meetings, and neither the assignee nor his solicitor attended either of them, though the meetings had in fact been appointed by themselves. They had also previously advertised the meetings in May, and when the parties came to Plymouth from London, they found that the renewed commission could not be opened, it having been kept back by the assignee and the solicitor, neither of whom chose to attend the meetings. There is one fact, likewise, which is certainly most extraordinary in these transactions. In the first commission there were the names of certain commissioners inserted; in the second commission of March the names were the same. But in the assignee's renewed commission, who then appear as the commissioners? It gives me, I must say, an unfavourable opinion of Mr. *Husband's* conduct in this business, that Mr. *Tomkin's* name should have been left out of the renewed commission. I do really think, for some reason or other, Mr. *Tomkin* was sought

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to be got rid of, because there was something which Mr. *Tomkin* would not have done. Can I say then that this is not a case which calls for further inquiry? I would have avoided giving judgment in this case, but I could not, in justice to the public and the parties interested, help doing so.

Looking at the Vice-Chancellor's judgment on the 26th December last, without any authority being cited to support it, I cannot say that it carries conviction to my mind. My opinion is, that the charge ought to be 20*l. per cent. per annum*, and that if there is a surplus the bankrupt is lawfully entitled to it. For I think the 104th section, coupled with the 135th section, keeps alive the provision of the 49 *Geo.* 3. c. 121. s. 4. And though the petitioners are no doubt culpable in lying by so long, yet there is not one fact in favour of the respondents. I am of opinion, therefore, that this is a case for further inquiry, subject of course to the responsibility for costs, on the part of the persons seeking such inquiry. I have thought it my duty to offer these observations, at greater length than I could have wished, as I have the misfortune on this occasion to differ with the rest of my learned brethren, but whatever opinions I have formed, whether erroneous or not, I have found some small degree of satisfaction in an earnest and anxious endeavour to arrive at the truth.

Sir J. Cross.—I regret much, that I must have the misfortune to differ on this occasion with one, at least, of my learned colleagues, especially after the anxious solicitude with which I have endeavoured to bring my mind to a just conclusion on this singular and complicated case. The petitioners, it appears, are the legal

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representatives of the bankrupt, by virtue of an assignment of the Court for Relief of Insolvent Debtors, made many years after the bankrupt had obtained his certificate. Great pains, however, have been taken to support these petitions, under the alleged right of one of the petitioners, as a creditor entitled to prove a debt under the commission. But as they have preferred their joint petition, as such subsequent assignees, and have in that character only sued out the renewed commission, I think this Court cannot now recognize them in any other capacity. This may therefore be considered, in every respect, as a suit between a bankrupt and his assignees, and as such I propose to deal with it.

On the behalf of the bankrupt, it is, amongst other matters, prayed "that the Court will *declare*, that in respect of the monies belonging to his estate, which the assignee from time to time had in his hands, or applied improperly, the assignee is chargeable with interest at the rate of 20*l. per cent. per annum*, for the time the same have been so misapplied or retained, and not with interest at the rate of 20*l.* per cent. only, without regard to time." This is the principal matter in dispute; and the object is by means of such charge, to work out an ultimate surplus or allowance for the bankrupt. And, to this end, the counsel for the petitioners have insisted upon the following grounds: 1. That the assignee is by law liable to such charge. 2. That when made, it will, in fact, produce a surplus in account against the assignee. 3. That the assignee is bound to pay over such surplus to the bankrupt, when the amount shall be ascertained on the final settlement of the accounts. But if they have failed to establish any one of these grounds, they will then have shown no

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interest in the petitioners, entitling them to apply to this Court to *declare* that the charge which they have proposed ought to be made against the assignee.

For the purpose of establishing the liability of the assignee, it is contended, 1. That he is chargeable for the former portion of the time which has elapsed, by virtue of the act of the 49 *Geo.* 3. c. 121., notwithstanding the repeal thereof by the 5 *Geo.* 4. c. 98., which came into operation on the 1st of May 1825. 2. That he is chargeable by the last-mentioned act during the period of its continuance, notwithstanding its repeal by the 6 *Geo.* 4. c. 16., which took effect on the 1st of September following. 3. That the assignee is chargeable from thenceforth to the present time, by virtue of such third act, although the bank (originally appointed by the creditors for the deposit of the money) failed about that time, and no other was afterwards appointed. I shall not at present dwell upon any of these intricate points, but shall assume that the assignee is so chargeable, and that the charge, when made, will produce the required surplus; and shall proceed at once to the third general question, whether, in that case, the assignee would be bound to pay over to the bankrupt the final balance of his account resulting from such charge, after having paid all the joint and several creditors in full, with lawful interest for the whole time, and discharged all the expenses of the commission. It does not appear to me necessary for this purpose, either, on the one hand, to decide that the bankrupt can in *no* case be entitled to a surplus so produced; or, on the other hand, that he is in *pari jure* with the creditors, and entitled in *every* such case to have the charge made for his own benefit. I shall carefully confine myself to

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cases like the present, where there is no *original* surplus or allowance due to the bankrupt, independently of the default of the assignee, and where the bankrupt has obtained his certificate, and has sustained no injury from such default.

It is contended on the part of the bankrupt, that, whether reasonable, or not, he is by law entitled to derive a profit from such default, though not otherwise affected by it; and that this Court is bound to assist him in obtaining that profit; that the law is imperative, that an assignee, who retains in his own hands, or applies to his own use, any sum of money of the estate of the bankrupt exceeding 100*l.*, must be charged with 20*l.* per cent. for the time such money shall be so retained or applied, and that the surplus, if any should result therefrom, will devolve upon the bankrupt. Now I agree with the counsel for the bankrupt, that this is a *remedial*, and not a *penal*, *law*. But I have always understood, that remedial laws are intended only for the relief of parties injured or aggrieved by the breach of them, and who alone can stand in need of any remedy. It is repugnant to common reason, to extend a remedial law to a party who has no grievance to complain of. The remedy must be co-extensive with the mischief, against which the law is intended to provide, and *cessante ratione, cessat lex*. In the present case, the creditors are the only party aggrieved. The assignee has retained and misapplied *their* money, and they may have a right, if any of the three acts be applicable to this case, to require the charge in question to be made upon him. But he has *not* retained or misapplied any money, to which the bankrupt was entitled; and he therefore is not wronged at all. He was entitled to no

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original surplus or allowance; yet, strange to say, the petitioners, who represent him, have made it matter of grave complaint, that the assignee has made him an allowance, to which he was not entitled, and which I find exceeded 5*l.* per cent. on the gross produce of the estate, exclusive of all expenses incurred in procecuting the commission. As far as regards the main question, it seems to me, that the surplus and the allowance are *in pari ratione.*

Whether a bankrupt, having a right to a surplus independently of such default, be entitled to make the charge in question, I am not now called upon to say; but I am of opinion, that a bankrupt, who rests his claim to require such charge solely on his claim to an ultimate surplus to be thereby produced, has no legal interest entitling him to call upon the Court to declare the assignee liable to such charge, whether for 20*l.* per cent. annually, or only once. I abstain from giving any opinion now, in which of these two forms the charge ought in such cases to be made; for, be that as it may, I think the judgment of the Vice-Chancellor, as far as regards this matter, ought to be affirmed. I can judicially know nothing of the reasons which induced that learned judge to dismiss the petitions, and can therefore only say, that whatever they are, the reasons which I have here shortly stated, have led me to the same conclusion. This being disposed of, all the rest of the voluminous matters that remain resolve themselves into a question of costs, which I think had better be reserved for further consideration after the judgment of the Court on the principal question shall be known, and the parties have decided what course they shall take in consequence of it.

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Sir G. Rose.—After all the time that has been consumed in the discussion of these voluminous petitions, they resolve themselves into two very short points:—1. Whether the renewed commission of June 1831 ought to be superseded: and, 2. As to the mode of taking the account. With respect to this latter question, it became highly material to consider,—and indeed it was conceded by the counsel for the petitioners to be the main point in these proceedings,—how far the order to take such accounts, if the Court were disposed to make such order, should, or should not, contain a declaration, that the assignee was to be charged with 20*l.* per cent. upon money improperly retained. But I am of opinion, that the petitioners are not entitled to any declaration whatever on this subject; and therefore it is unnecessary for me, on the present occasion, either to assent to, or dissent from, the judgment of the Vice-Chancellor. But, with regard to the result of any inquiry that may be directed in this matter, so far as respects the costs, I have little hesitation in saying, that a bankrupt cannot stand against his assignees in enforcing this charge of 20*l. per cent.* And I hold it to be equally clear, that unless the renewed commission of March 1831 was a valid commission, it is impossible for the petitioners to found upon that commission any right to supersede the subsequent commission of June 1831. It is material, therefore, to inquire, whether these petitioners had any right to take out a renewed commission. The petitioners are the assignees of *Aaron* under the Insolvent Act, and therefore the commission issued by them is, in effect, the commission of the bankrupt. Now can a bankrupt issue a commission against himself, either upon principle or authority?

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Nothing is certainly more contrary to the principle of the bankrupt law, than that a bankrupt should in any way interfere with this process against himself; and, in this view of it, before the late act took effect, a concerted act of bankruptcy, both at law and in equity, rendered the commission invalid. It is not my intention to go through the statutes upon this subject, but the last Bankrupt Act (*a*), from which alone the Chancellor derived his authority to award a commission, expressly says, he must do it upon the petition of a *creditor*. Then on what principle is a renewed commission, which is to give effect to the original commission, to be awarded on the petition of a person who is *not a creditor?* The power given to the Chancellor, to award each commission, is precisely the same; and, considering the matter as a question of title, would any purchaser be satisfied with a conveyance from assignees under a renewed commission, issued upon the application of the bankrupt? The cases that have been cited in the course of the argument, to shew that a commission may be sued out at the instance of the bankrupt, will, when properly examined, be found to be no authority whatever in support of that position. In *Ex parte Waring* (*b*), all that was said by the Vice-Chancellor was, that it was not necessary that a person should be a creditor to take out a renewed commission; he did not decide that the *bankrupt* might take it out. And in *Ex parte Galpin* (*c*), where the bankrupt petitioned for a renewed commission, the same learned judge expressly said, that, to remove all doubt, the commission should be ordered to issue on the petition of the assignees, and not on that of the bankrupt. Now, if there was ever a

(*a*) 6 *Geo.* 4. c. 16. s. 12. (*b*) 1 Mont. 216. (*c*) Ibid. 207.

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case in which a renewed commission might have issued on the application of the bankrupt, *Ex parte Galpin* was that case; for all the creditors had been paid the full amount of their debts; and the only object of the renewed commission was, to enable the bankrupt to surrender, for the purpose of petitioning to supersede. But in the case of *Ex parte Dumbell* (*c*), which occurred before Lord *Eldon* in the year 1825, and which was an application of a bankrupt to supersede a renewed commission, Lord *Eldon* expressed a decided opinion, that he had no authority to direct a renewed commission to issue, except upon the petition of a creditor. A bankrupt, indeed, is the last person in the world to be trusted with the working of a commission; for he has no right to interfere in the choice of assignees, and in many other acts, which can only be done legally by creditors. Therefore, as to that part of the petition which prays for a supersedeas of the commission of June 1831, upon the preferable title of the former commission of March, 1831, the petitioners have no case; and as this petition is in the nature of an appeal, it must, as to that part of it, be dismissd with costs.

It has been said, that it would be a hardship upon a bankrupt, who may happen to have a large interest in his assets, that he should be prevented from taking out a renewed commission, when such a proceeding is necessary to prosecute his claim. But there is no hardship whatever in the case. The bankrupt has only to call upon his assignees to take out a renewed commission, and if they refuse, then to present a short petition to compel them; and they must either do so, or show that

* There is a note of this case in the books of the Secretary of Bankrupts.

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the bankrupt has no interest to warrant such an application. If this course had been adopted in the present instance, much time and expense would have been saved.

It remains then to consider, how far, on the present occasion, we are bound to give a decision, as to the charge of 20*l. per cent.* on the money retained by the assignee, contrary to the direction of the statute; whether or not the charge is to be taken as 20*l.* per cent. *per annum,* or as one single sum of 20*l.* per cent., I have long entertained an opinion, which, in this case, it is unnecessary to express; for the question here is, has the *bankrupt* a right to make this charge upon the assignee? Now this must depend either on the provisions of the statute, or on the relation between them of trustee and *cestui que trust.*— But first, according to the language of the statutes, the bankrupt can be looked upon in no other light than an insolvent, or a fraudulent debtor. I challenge any one to look through the different acts, and say, however great may be the modern sympathy for bankrupts, whether the bankrupt is not uniformly treated by the legislature as either insolvent, or fraudulent, and in many instances as both. Next, as to any relation of trustee and *cestui que trust* subsisting between the assignees and the bankrupt, there can be nothing collected from the 63d section of the Bankrupt Act, directing the Commissioners to convey the bankrupt's estate to the assignees, or indeed from any other section of the act, from which such a relation can be inferred. It can only begin to subsist, where there is an actual surplus of the bankrupt's property, and not a moment before. The only benefits to the bankrupt

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which the statute contemplates are, his allowance, and his certificate; in each case recognizing him as insolvent, and as probably also fraudulent. Who are to choose the assignees under his commission? The creditors, simply. This Court will remove them, if the bankrupt in any way interferes in the choice. The assignees, then, under the statute are the trustees of the *creditors*, and not of the bankrupt,—it is the money of the *creditors*, which the statute considers the assignees as holding, and the Commissioners are required to audit the account of the assignees, for the express purpose of a dividend among the *creditors*. The assignees are required to state, and do state, in this account, all the monies they have received. But are they required to state, or do they state, the charge of 20*l.* per cent.? No. The *Commissioners* are directed to *charge* them with the 20*l.* per cent., should the occasion call for it; but it is not to form an item of account; the Commissioners are merely to make it a penal incident to the account, and divide it among the creditors. The *statute* recognizes no interest of the bankrupt in this charge, and in practice all interference on his part is excluded. When there is a *surplus* of the bankrupt's estate, what remedy has he under the *statute*, if the assignees refuse to hand it over to him? Can the *Commissioners* make an order on the assignees to pay it to the bankrupt, as they can, with respect to a dividend among the creditors? Unquestionably not. For when the bankrupt's surplus arises, the jurisdiction of the Commissioners is gone. It ceases with that which should have prevented its very existence, namely, with the bankrupt's solvency. But it is at *this* period, that the relation of trustee and

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cestui que trust begins to operate between the bankrupt and his assignees, upon the ordinary principle of a Court of equity; and the ordinary mode of proceeding would be, for the bankrupt to petition this Court for an order on the assignees to pay over the surplus,—not by force of any enactment in the statute, but on general principles of equity; for this mode of proceeding, though in form a petition in bankruptcy, is, in effect, a suit in equity; and in many cases,—as where, for example, there is a partner who is not a bankrupt,—it ought in strictness to be so. The bankrupt therefore must proceed, according to that mode of taking accounts between trustee and *cestui que trust*, adopted in Courts of equity. If the assignees have employed the surplus and made a profit of it, they must be charged with that profit, or with interest, at the option of the bankrupt, their *cestui que trust*. But if you put your foot into a court of equity, you can acquire no *locus standi*, from the incident of any *penalty* imposed on the assignee in taking the account. And, as already suggested, if the bankrupt was in partnership before his bankruptcy, the surplus then cannot be determined, without having before the Court his partners, or their representatives. For without their consent, what jurisdiction is there, as to them, in the bankruptcy? This, too, will serve to try the claim of the bankrupt to the charge of 20*l.* per cent. Is it to be pretended, that this 20*l.* per cent. is to follow all the results of the commission? For if it is to be considered as the bankrupt's property, it must, before he can touch one sixpence of it, go over to the joint estate, and be divided among creditors, who would have no more right to it than I should have.

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Ex parte Lowe and another.

Upon the whole, the impression of my mind is, that the Vice-Chancellor's decision in this case should be in all respects confirmed. But, if the petitioners are inclined to take an order for an account, then, as there is so great an improbability of a surplus, without the aid of the 20*l.* per cent., I think it but reasonable, before the assignee is committed to such an account, that he should he secured as to his costs. If the petitioners, therefore, are willing to give this security, I have no objection that it should be referred to a London Commissioner to take the account, without any declaration, however, as to the right to charge the 20*l.* per cent. But when I consider all the circumstances of this case; the utter improbability of any actual surplus; the nature of the claim made by the petitioners; the silence of the bankrupt during so many years; his omitting to insert this claim in his schedule, upon taking the benefit of the Insolvent Act; the absence of the bankrupt's partner, or his representatives, who ought strictly to have been parties to these proceedings; when I consider, too, the motives which appear to have led to this litigation; I must confess—without saying how far I approve of the conduct of the assignee, or his solicitor, in this bankruptcy—I should altogether have been better satisfied in giving full effect to the Vice-Chancellor's order, and in dismissing these petitions with costs.

1832.

Council Room, Lincoln's Inn, February 16.

The circumstance of a petitioning creditor residing at a distance of 85 miles from the place where the fiat is to be opened, is not, of itself, a sufficient reason for dispensing with his personal attendance before the commissioners to prove his debt.

Ex parte Cox.

THE petitioners in this case were the petitioning creditors against a bankrupt, the greater part of whose creditors resided at Devonport, but the petitioners themselves resided at Beaminster, which was 85 miles distant from the former place. For the convenience of the general body of the creditors, the petitioners consented that the fiat should be worked at Devonport; and they now applied to the Court, that the general order (*a*) might be dispensed with, which requires the personal attendance of the petitioning creditor at the opening of the fiat, on the ground of Devonport being at so great a distance from their place of residence, and there being no direct public conveyance between the two places.

Mr. *H. N. Coleridge*, for the petitioners, referred to *re Graham*, Buck 47, where the petitioning creditor, who was called by business into the country, was allowed to prove his debt by affidavit before the commissioners in London.

Sir G. Rose thought there was no reason why the petitioning creditor should be compelled to travel such a distance, if his affidavit satisfied the commissioners of the validity of the debt. He never knew of such an application having been refused, except in *Ex parte Williamson*, 1 Jac. & W. 240; but in that case the excuse offered for non-attendance was, that the distance was only 47 miles.

(*a*) 26 Nov. 1798. See 2 Deac. B. L. 94.

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Ex parte Cox.

The rest of the Court, however, were of opinion, that although there may be instances of personal inconvenience, which might induce the Court to depart from the general rule, yet that there were not sufficient grounds stated in this case to dispense with the personal attendance of the petitioning creditor; that if the question was to be decided by distance alone, it would be difficult to fix what distance should authorize the dispensation; and that although the petitioners stated there was no direct communication between Beaminster and Devonport, they did not state that there was not a conveyance to Devonport within a short distance of the town of Beaminster.

Petition dismissed (*a*).

Lincoln's Inn. February 16.

When a matter may be referred to a judge.

Ex parte JEFFERY, in the matter of TWORT.

A Contract had been made by the bankrupt previous to his bankruptcy, as to the sale of some timber on his estate. And upon an application for an order of reference to the commissioners to certify whether the contract was beneficial for the creditors of the bankrupt, the Court said, that one of the judges would take the reference, and the same in all cases where it had been the practice hitherto to refer any matter to a Master in Chancery.

(*a*) The distinction that appears to be deducible from the cases relating to the personal attendance of the petitioning creditor is, that his attendance will not be dispensed with on the ground merely of its being inconvenient to himself, but only in cases of imperative necessity, as where he is prevented by illness, or other excuse of the like nature. *Ex parte Edwards*, 8 Ves. 318.

1832.

Ex parte AUSTIN, in the matter of KING.

Lincoln's Inn, February 7.

Quære. Whether fixtures are within the 72d. section of the bankrupt act.

THIS was the petition of an equitable mortgagee of the bankrupt's lease, for a sale of the demised premises; and the petitioner further prayed, that the Court would declare the deposit of the lease to constitute a lien upon the fixtures, as well as on the premises specified in the lease.

Mr. *Montagu*, for the assignee, said, it would save the expense of an inquiry before the commissioner, if the Court would intimate its opinion on a point, which had not yet been formally decided by any Court sitting in bankruptcy; and that was, whether, or not, tenant's fixtures in the order and disposition of the bankrupt, as tenant, passed to the assignees under the 72d. section of the 6 *Geo.* 4. c. 16. In *Horn* v. *Baker* (*a*), it was decided by the Court of King's Bench, that fixtures, which were not fixed to the freehold, did pass to the assignees, as being left by the true owner in the possession, order and disposition of the bankrupt as reputed owner.

Mr. *Swanston*, for the mortgagee. There can be no doubt that there is in this case an equitable mortgage, as far as the house is concerned. And with respect to the fixtures, it is questionable, whether they are not exempt from the operation of the 72d section, as being utensils let out to traders by the usage of the trade in which the bankrupt was engaged. This was a distinction taken by the Court in *Horn* v. *Baker*, and recognized in the later case of *Storer* v. *Hunter* (*b*).

(*a*) 9 East, 215.

(*b*) 3 B. & C. 368.

1832.

Ex parte Austin.

Sir G. Rose.—I have no hesitation in saying, that where fixtures are capable of removal, as between landlord and tenant, without injury to the freehold, they are within the order and disposition of the bankrupt.

The rest of the Court declined giving an opinion, until the commissioner had made his report as to the nature of the mortgage property, and of the fixtures claimed by the mortgagee.

The case was, therefore, referred to the commissioner.

Ex parte ELLIS and others, in the matter of TROUGHTON and WATTS.

1832.

Lincoln's Inn, February 16.

THIS was an application on the part of the assignees, and the majority of the creditors, of the bankrupts, that the appointment of the official assignee might be rescinded, under the following circumstances, which were stated in the petition. The commission was issued before the Bankruptcy Court Act came into operation, but the choice of assignees did not take place till afterwards. The bankrupts stopped payment some time previous to the issuing of the commission, and absconded with a large sum of money, on which occasion the petitioners were appointed trustees of their estate, to protect it on behalf of the creditors. They took that trust upon them, and preserved the stock in trade of the bankrupt till the commission was opened, and the messenger put in possession. The stock consisted of an extensive assortment of linen drapery and haberdashery; and the petitioners, being in the same trade as the bankrupts, were perfectly acquainted with the best mode of realizing it, and had made arrangements for its immediate sale; in which event the proceeds would be forthwith paid into the Bank of England, where the petitioners had opened an account in their joint names. A strong disposition was felt by all the creditors at the second meeting against the appointment of an official assignee, on account of the burthen which they conceived such appointment would be to the estate. The creditors, therefore, wished to decline the advantage tendered them by the statute, of having an official assignee;

By 1 & 2 W. 4. c. 56. s. 36. the Court has power to remove an official assignee, as well as any other assignee.

By *section* 40 the Commissioner has a discretion to appoint, or not to appoint, an official assignee, where a commission issued before that act began to operate. But where the Commissioner appointed one, thinking he had no discretion, the Court will not on this ground alone remove the official assignee.

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but the Commissioner at the third meeting felt bound to appoint one, assigning the following reasons why he thought he had no discretion.

"I am in this case requested not to appoint an official assignee. It is stated to me, that it is the wish of the creditors that an official assignee should not be appointed, partly because it would be an unnecessary expense, and partly because there are documents which ought to be kept secret, and which might be disclosed if an official assignee were appointed. I give no opinion upon the sufficiency of those reasons, assuming even that they are founded on fact, because I do not think myself at liberty to exercise any discretion as to the appointment of an official assignee. I consider myself bound to appoint one. The clauses in the new act which are mentioned, are the 40th, 45th, 46th, and 47th. The three last specify the sources of revenue to the Court; the 45th provides for a fiat; the 46th for fiats and commissions worked in the Court; the 47th for commissions removed into the Court after the choice of assignees. It is plain, that neither the 45th nor 47th section applies to the present case, for in this case there was no fiat, but a commission; and assignees had not been chosen before the 12th January 1832. The 46th section alone applies: 20*l.* must be paid for working the commission—but by whom?—By the official assignee; that, of course, implies that an official assignee should be appointed. It is said, that the 40th clause leaves it discretional with the Commissioners to appoint, or not; but reading that clause in connection with the other three, I am of opinion, that it was intended that that discretion should be exercised only in cases where the

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Ex parte ELLIS and others.

regular choice of assignees had taken place before the 12th of January.

(Signed) *R. G. C. Fane.*

Court of Bankruptcy, February 2, 1832."

Mr. *Swanston*, for the petitioners, contended, that they were the best judges of their own interests, and had a right to decline, if they chose, the advantage of an official assignee. The question is, whether the Commissioner is bound to make the appointment, as a mere ministerial act, contrary to the wishes of the creditors. The reluctance of the creditors was not on account of any personal objection to the official assignee, but merely on the ground of the expense to the estate. The sum and substance of the reasons assigned by the commissioner is, that as each commission is chargeable by the act with the sum of 20*l.*, which is directed by the 46th section to be paid by the official assignee, the Commissioner thought he had no discretion; and that an official assignee must in every case be appointed, except where assignees had been chosen before the act came into operation, when he admits he had a discretion under the 40th section. The petitioners did not dispute that the 20*l.* ought to be paid, but they deprecated the appointment of an official assignee for that sole purpose, when that would be productive of such an unnecessary expense to the estate. The value of the bankrupts' stock in trade was 12,000*l.*, so that the fees of the official assignee, at the rate of 2½ per cent. would amount nearly to 300*l.*, and this sum he would be entitled to receive, without any adequate benefit to the estate. The 40th section of the new act is not drawn with the most consummate accuracy,

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in using the words "existing assignee;" and this induced the Commissioner to think, that the discretion given him by the 40th section was only intended to apply to those cases, where the assignees had been chosen before the act came into operation. [*Erskine*, C. J. If you will refer to the 22d section, that will assist us to interpret the meaning of the 40th section. The 22d section expressly declares, that the official assignee is in *all cases* to act with the assignees to be chosen by the creditors.] The provisions of the 22d section seem to be confined to the proceedings under a fiat, and not to those under a commission issued before the passing of the act. But whatever may be the construction of these sections, there is no dispute that under the 36th section the Court has the power to remove *any* assignee, and as there are no words to limit this power to any *particular* assignee, it of course extends to any official assignee. The question therefore was, whether the Court would now exercise this power, in accordance with the wishes of the creditors, and for the benefit of the estate.

Mr. *Rogers*, for the official assignee. Whenever the Court removes an assignee, it is for the purpose of appointing another; but here no other is specified, nor would that indeed meet the object of the petitioners. The legislature has declared in its wisdom, that there should in every case be an official assignee, through whom the proceeds of a bankrupt's estate might be passed to the Accountant General, and whose duty it is to do certain other acts for the protection of all the creditors. The 22d section of the act is the most material on this subject, and that is imperative.

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[*Sir A. Pell.* Is it contended, that the appointment of an official assignee is to depend upon the wishes of the creditors? *Sir J. Cross.* That would lead in all cases to the conclusion, that the official assignee is not to be appointed, if the creditors disapprove.] It is said, that the assignees chosen by the creditors have made every arrangement for selling the bankrupts' stock, and that an official assignee would have therefore nothing to do; but, by the 23d section of the act, the official assignee is expressly excluded from intermeddling with the sale of the bankrupt's effects; so that matters would go on just the same, if the assignees had not made any arrangement for that purpose. Then it is said, that the petitioners have opened an account at the Bank; but that is in their own names, and the act expressly says, that a public officer, the Accountant General, is to have the control of all the assets of a bankrupt's estate, as a check upon the general assignees. The official assignee, also, gives security to the amount of 6000*l.* for the due administration of the bankrupt's funds, which the other assignees do not; and yet they contend, in the face of the act of parliament, that they ought to keep the control over the funds of the bankrupt. There is no ground for this application, unless it can be shown that the Commissioner had a discretion; and the 40th section is not discretionary as to the appointment of an official assignee, but merely gives the commissioner a discretionary power to *appoint some one* out of the list of official assignees. But supposing that the Commissioner had a discretion, and had exercised it, could this Court control a judge in cases where he had equal power with itself, and where he does not exceed his authority? For by section 30 the right of

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appeal from a Sub-division Court of the Commissioners is confined to matters of law or equity, or of the refusal or admission of evidence. And the objection urged in this case is founded on neither one nor the other. In like manner the 31st section limits the appeal from the decision of any one of the Commissioners; so that the Court has in this instance no authority over the Commissioner. Whenever the sum of 20*l.* is payable to the Accountant-General, under the provisions of the 46th section, the act contemplates the appointment of an official assignee; for he alone, and no other, is directed to make this payment. When it is said, that a large body of creditors have come forward to express their wishes on this occasion, it is not pretended that *all* the creditors concur in this application; and the smallest in amount is as much entitled to the protection of the legislature, as those who have joined in this petition.

Mr. *Swanston*, in reply. When the bankrupts' estate will be burthened with so heavy an expense as that of 300*l.*, for the sake of an official assignee, and the estate will receive no adequate benefit from this appointment, the creditors have good reason for objecting to it. [*Sir A. Pell.* You are assuming that the official assignee will receive 300*l.* But the Judges have made an order, that the remuneration of the official assignee shall be in proportion to his services.] The order (*a*) recommends the Commissioners to allow the official assignee 1*l.* per cent. on the monies he receives, and 1½*l.* per cent. more on the monies actually to be divided. If the legislature impose on the creditors a benefit,—which they may

(*a*) See App. p. xxviii. Rule xxvii.

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possibly misinterpret,—may they not decline the benefit, or take the opinion of this Court whether they are bound to accept it, contrary to their wishes? The 36th section of the act enables this Court to remove *any* assignee. [The Court here intimated that they were satisfied of their *power* to remove, and that the 36th section extended to *official* assignees, as well as those appointed by the creditors.] Then I am to contend, that that section enables the Court to remove an assignee, although no other is appointed. The practice before was different, because the assignee was then in all cases chosen by the creditors. I submit that the Commissioner has, in the first instance, a discretion as to the appointment of an official assignee; but if not, then that this Court may exercise such discretion. The deliberate opinion of the creditors ought to be a circumstance of great weight, and they have undoubtedly a right to entertain an opinion as to what is most conducive to their own interests. Will not this Court, therefore, regulate its decision by the opinions and wishes of the parties interested,—not, indeed, so as to curtail or fetter the judgment of the Court,—but to serve as a sort of guide for the exercise of its judgment and discretion? For if in any case the Court has the power to remove the official assignee, it seems reasonable that it should do so on the present occasion, when the measure would prove so decidedly beneficial to all the creditors of the bankrupt.

ERSKINE, C. J.—Upon looking at this act of parliament, there can be no doubt of the power of the Court to remove any assignee, official or otherwise, without being under the necessity of appointing another. For

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suppose a commission was nearly worked out, and an official assignee should misconduct himself, and sufficient cause were shown for his removal, could it be argued that we could not remove him, without appointing another, where there were no duties left for him to discharge? Then it is said, that the Commissioner ought in this case not to have appointed an official assignee, and that the Court should exercise the power given it by the 36th section of the recent statute, and remove the assignee, because he is unnecessary. Now, it is clear, that by the 40th section a discretion is vested in the Commissioner to appoint, or not to appoint, an official assignee in all cases of commissions issued before this statute came into operation, "to act with the existing assignees." But it is said, the reason why the Commissioner appointed an official assignee in this case was, that he considered himself obliged to do so, without exercising any discretion. Upon looking, however, at the whole tenor of the act, I think it doubtful whether the Commissioner was bound, at all events, without considering the circumstances of the case, to appoint an official assignee. The 22d section is imperative; and it would seem,—from the language of the 39th section, down to where it is said, that commissions depending before the former Commissioners shall be removed into the Court of Bankruptcy, and shall be "carried on in the like manner, as if they had originally been commenced therein by virtue of a fiat,"—that in this instance, also, there was no discretion as to the appointment. But the 39th section does not stop there, for it goes on to say, "save as may be otherwise directed by this act;" and then the very next section gives the Commissioner a discretion, in such last-mentioned case,

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to appoint an official assignee, or not. It has been said, that the 40th section is confined to cases where the creditors' assignees had been already chosen; but I do not think the inference necessarily arises, that that section contemplates assignees already appointed; for when it is there said, that the official assignee shall act with the existing assignees, "*if any;*" I think it clear, that the legislature contemplated the case of commissions removed into the Court of Bankruptcy, in which the creditors' assignees had not been chosen. The Commissioner, then, has in this case appointed an official assignee. It is true, that he has stated as his ground for doing so, that he thought he had no discretion. But is that a sufficient reason for us to exercise the power given us by the act, of removing that assignee? In my judgment, that is not sufficient to induce me to say, that the official assignee ought to be removed. It is imperative upon those who seek his removal, to make out such a case as to show that no official assignee ought to have been appointed, and I have not heard any circumstances detailed to us, which can induce me to come to that decision.

Sir A. PELL.—If I were called upon to give an opinion as to the powers of the Commissioner, I should say that I was inclined to think, that under the 40th section he had a discretionary power. But this is not the question before us; but whether, under the 36th section of the act, giving us power to remove assignees, —and of course official assignees,—we should order the removal of the official assignee appointed in this case. The petition is preferred on two grounds: first, that an official assignee is not necessary in this case, and

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that the appointment of one would therefore throw a needless burthen on the estate; and secondly, that he ought to be removed, because his appointment has been contrary to the wishes of the creditors. With respect to the last point, I can imagine many cases in which the creditors may object to the appointment of an official assignee, where the appointment of one nevertheless would be extremely proper. Then ought this assignee to be removed, on account of the charge he may bring on the estate? Now, in one of the orders (*a*) drawn up by the authority of this Court, it was the intention of the Judges, that where there was little for the official assignee to do, he should not come in and sweep away a large portion of the estate, that ought to go to the creditors, but be paid according to his services; and the order seems expressly framed to meet such a case, as the present is stated to be. For, on application to this Court, the usual per-centage may be reduced, if the duty discharged by the assignee should not entitle him to so large a remuneration. I have all along felt, that it would be contrary to every principle of justice, if a large reward were given to an officer arbitrarily appointed, who may not have done services entitling him to it; and the legislature acting upon this principle, has accordingly left the amount of the reward to be fixed by this Court. I concur, therefore, in opinion with his Honor the Chief Judge, and think there are no sufficient grounds stated in this case for the removal of the official assignee.

Sir J. Cross.—As it is the opinion of the Court, that the grounds which the petitioners have stated for

(*a*) See *ante*, p. xxviii. Rule xxvii.

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the removal of this assignee are insufficient, it seems to be unnecessary to go into the question, whether the Court has jurisdiction, or the Commissioner discretion. I think it right, however, to examine into the causes alleged in the petition for such removal: as it is the first case of the kind that has come before us under the late act of parliament, and because it appears to me that the petitioners labour under some misapprehension. The substance of the grounds stated to us for removing the official assignee is, that the other assignees had rather not have him. The objection of the petitioners amounts to this, that the appointment of the official assignee would be too expensive; and the counsel for the petitioners has stated, though it does not appear in the petition, that the dividend to be declared would be on 12,000*l.*, which at $2\frac{1}{2}$ per cent. would give nearly 300*l.* But it should not go forth to the public, that the official assignee could claim so enormous a sum as 300*l.*, for so little trouble as it was represented he would have. There could be no doubt in this case, if the Commissioner were to give 300*l.*, that the creditors would be relieved upon application to this Court. For the Court has qualified its order as to the remuneration of the official assignee, by saying that the per-centage might be *increased*, or *diminished*. It comes then to this. The assignees say, we do not like this new yoke-fellow; he will be of no benefit to the estate. But are the assignees the only persons interested on this occasion? Are not all the creditors interested, and among them many creditors who have not yet had an opportunity of proving under the commission? The official assignee is appointed, not merely for the benefit of the creditors' assignees, but for that of all the creditors,

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and of the bankrupt himself. Suppose one of the assignees were to die, who would be answerable for his executors performing their duty? For the assignees now enter into no covenant to account for the estate and effects of the bankrupt, as was formerly the practice; for by the new act the whole estate is vested in them, without any deed of assignment. The property is now put *in custodiâ legis* for the benefit of the creditors, and the official assignee gives security to the extent of 6000*l.* for the faithful discharge of his duty; so that the creditors are insured against those breaches of trust on the part of assignees, which we know from melancholy experience have too often taken place. The legislature has provided that a public officer shall be appointed, not for the impoverishment of the creditors, but for their benefit. The assignees come here and say, take away this protection, for reasons which are perfectly groundless.

Sir G. Rose.—In either way of putting the question, I have no doubt that this Court has jurisdiction to remove the official assignee. But my difficulty is, that the Commissioner has here said that he felt himself *bound* to appoint one, and consequently, that he has not had an opportunity of exercising his discretion in the appointment, which it was the intention of the act to give him. It has been said, that the appointment of an official assignee is for the general good of the estate. But, surely, those whose interests are most concerned ought to know best what is for their general good; and yet these creditors are so perverse, as to repudiate all the advantage they might derive from such an appointment, and to express their apprehensions, that the minimum

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Ex parte ELLIS and others.

of the quantum meruit to which the official assignee would be entitled, would be no very light burthen imposed by the legislature on the dilapidated funds of a bankrupt's estate. It appears to me, that a reference should be made to the Commissioner, to consider whether the appointment of an official assignee would in this case really tend to the advantage of the creditors. But, as the majority of the Court have decided that the petition should be dismissed, it must take that result, with my opinion as to the manner in which it ought to have been entertained.

Mr. *Swanston* then submitted, as the Court thought the Commissioner had a discretion on the subject, whether this ought not to be intimated to the Commissioner, in order that he might have an opportunity of exercising such discretion.

But his Honor the Chief Judge said, they could not do that, as there was no formal direction of the matter by the Commissioner for the decision of the Court.

Petition dismissed; but costs of both parties to be paid out of the estate.

Ex parte JOHNSON.

Lincoln's Inn, February 17.

Where all the creditors lived in London, except two, a London fiat was directed, instead of the country commission already issued, which last was ordered to be impounded.

THIS was the petition of the assignee of a bankrupt, praying that a commission, which was issued in December last, and directed to Commissioners at Norwich, might be superseded, and that a fiat might issue instead, to be worked before one of the London Commissioners.

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Ex parte Johnson.

The ground of the application was, that all the creditors lived in London except two, who had already proved their debts, and consented to this application. The bankrupt had not yet surrendered.

Mr. *Wigram* appeared on behalf of the creditors.

The Court refused to supersede the commission, but directed it to be impounded in the Bankrupt Office, and not to be taken out of the office without leave of the Court; and thought it reasonable that a fiat should issue as prayed.

Ex parte Jenkins, in the matter of Nokes.

ebruary 17.

A petition cannot be reheard, unless the order made on the former hearing is drawn up.

This was a petition of appeal to the Lord Chancellor, praying that an order of the Vice-Chancellor for superseding a commission might be reversed. The petition in this case, being to the Lord Chancellor, was heard by consent before the Court of Review. It appeared that the Vice-Chancellor's order, which was made on the 16th June last, had never been drawn up; and part of the prayer of the petition was, that the drawing up of the order, and the issuing of the writ of supersedeas, might be suspended until the hearing of the petition.

Mr. *Montagu* and Mr. *Anderdon*, for the petitioner, proceeded to argue, that the commission ought not to have been superseded, and said that the main point in contest here was the costs; which, when a decision

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Ex parte JENKINS.

was reversed, that party was bound to pay, who was originally wrong.

Sir G. ROSE.—In what position do you stand, when the order of the 16th June is not drawn up? Every case of appeal proceeds upon an order actually drawn up. How can we then rehear a petition, when the order made upon it is not before us? You can have no place in Court, while the order appealed from is not drawn up.

The rest of the Court concurring in his Honor's opinion, the petition was dismissed with costs.

Mr. *Swanston* appeared for the respondents.

Ex parte JOHN BRADLEY SHUTTLEWORTH and JOHN HANCOCK, in the matter of MARMADUKE WILLIAM DEANE.

Lincoln's Inn, February 16.

A landlord distrained for rent arrere before the bankruptcy of his tenant, and when the goods were appraised left them on the premises for the use of the bankrupt's wife, the bankrupt himself being in prison. After the bankruptcy, the landlord distrained again for the very same arrears of rent: Held, that the second distress and disposition was void; and that the goods passed to the assignees, as being in the order of the bankrupt at the time of his bankruptcy.

THE petitioners in this case were two of the assignees of the above named bankrupt. The facts stated in the petition were as follows. Previous to May 1831, the bankrupt carried on the trade of a grocer and tea-dealer at Richmond, in Surrey, in a house belonging to one *Thomas Ford*, his father in law, which was let to the bankrupt, as tenant from year to year, at an annual rent of 60*l*. In March 1831, the bankrupt became embarrassed in his circumstances; and on the 17th March 1831, he was arrested and committed for want of bail to the Marshalsea prison. On the 8th April

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Ex parte SHUTTLEWORTH and another.

following, the bankrupt, being then confined in such prison, presented a petition to the Court for relief of Insolvent Debtors, and upon the hearing of the petition, and some time after the issuing of the commission of bankrupt against him, obtained his discharge. During the time of his imprisonment, and up to the time of issuing the commission, he retained the possession of the house, with the stock in trade; and his wife and family resided and carried on the business in the house by his authority, and for his benefit. On the 21st March 1831, *Thomas Ford* distrained the bankrupt's goods for the sum of 77*l.*, for arrears of rent to Christmas 1830, which which were duly appraised at the sum of 90*l.* 14*s.* and were taken by *Ford* at such appraisement; though he did not pay for them, but undertook to retain out of that sum sufficient to satisfy the rent so due. On the 26th March 1831, *Ford* again distrained other goods of the bankrupt for the sum of 15*l.*, for one quarter's rent up to Lady-day 1831, which were duly appraised at the sum of 15*l.* 17*s.* 6*d.* and were also taken by *Ford* in satisfaction of such last mentioned arrears. At the several times when the goods were so taken by *Ford* they were delivered over to him, and he took possession of them; but they were not at any time removed from off the premises, and the whole with his consent remained thereon for the use, and in the possession, of the bankrupt, until the period of his bankruptcy. A commission issued against *Deane* on the 5th March 1831, under which he was duly declared a bankrupt; and on the 6th May 1831, a provisional assignment was made of his estate and effects, and the provisional assignee took possession of all the goods and effects upon the bankrupt's premises, including the

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goods so remaining in the bankrupt's possession. On the 11th May 1831, *Ford* served the provisional assignee with a notice in writing, claiming these goods as his own, and threatening him with an action of trespass, unless he immediately withdrew possession. On the 10th May 1831, *Ford* again distrained the goods of the bankrupt for the sum of 60*l.* for one year's rent up to Lady-day preceding, which goods were then in the possession of the provisional assignee, and which were appraised at 87*l.* 12*s.* On the 24th May 1831, the petitioners and *Ford* were chosen assignees of the bankrupt's estate and effects, and an assignment thereof was duly executed to them. On the 27th May 1831, the goods so taken under the last mentioned distress were sold for 87*l.* 12*s.*, the value so put upon them by appraisement, of which the sum of 5*l.* 5*s.* 5*d.* only was paid to *Ford*, as such assignee, to the account of the bankrupt's estate; and the residue, after deducting thereout 12*l.* 7*s.* 4*d.* for king's taxes, and 9*l.* 19*s.* 3*d.* for the expenses of the distress and appraisement, was paid to *Ford* for the rent so claimed as last aforesaid. It was contended, that at the time of the last mentioned distress no rent whatever was due by the bankrupt to *Ford*, as the whole of such rent up to Lady-day 1831, had been paid or satisfied by means of the distress made on the 26th March; and that by means of the last distress aforesaid the bankrupt's estate had sustained a loss of 69*l.* 19*s.* 3*d.*

The petitioners therefore prayed, that *Ford* might be charged in his account, as such assignee, with the said sum of 69*l.* 19*s.* 3*d.*, in addition to the said sum of 5*l.* 5*s.* 5*d.* so received by him, as such assignee; or that the petitioners might be at liberty to bring an action

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against him, for the value of the goods so improperly taken by distress on the 10th May 1831; and that he might be restrained by the order of the Court from setting up his title of assignee under the said commission upon the trial of the action, or using his said title as any defence thereto.

There was an affidavit of the solicitor for the petitioners echoing the statements in the petition. *Ford* in his affidavit swore, that the goods distrained under the two first distresses were left in the possession of the bankrupt's wife, who was *Ford*'s daughter, and that the bankrupt was all that time confined in prison. He denied all collusion with the bankrupt, and swore that he levied the third distress, because he was advised that the former distresses would be set aside by the commission of bankrupt, but that a fresh one could not; and he also signed an admission of all the material facts.

Mr. *Flather*, for the petitioners, stated that *Ford* was examined before the commissioners as to the facts stated in the petition, and proposed to read his examination.

Mr. *Anderdon*, for the respondent, objected to the reading of the examination, before it was proved, that *the Thomas Ford* there named, was the respondent in this petition; and contended, that the bare production of the proceedings, without proof of *Ford*'s signature, could not be admissible in evidence. On the trial of an action, the handwriting of the examinant must be proved at the trial, before the examination can be admitted. And the Court here cannot take judicial notice of the signatures of the Commissioners.

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The Court however overruled the objection, on the ground that as the proceedings came out of the hands of the assignees, they were evidence against either of them; and that the contents of the examination afforded sufficient proof of identity, that the *Thomas Ford* examined before the Commissioners, was *Thomas Ford* the respondent.

Mr. *Flather* in continuation. The material question for the Court to decide is, whether the rent due was not satisfied by the previous distresses on the 21st and 26th March; and whether the goods which *Ford* permitted to remain, after such distresses, in the bankrupt's house, are not to be considered in the order and disposition of the bankrupt at the time of his bankruptcy.

Mr. *Anderdon*, for the respondent. There has not been such a satisfaction of the rent under the previous distresses, as to deprive the landlord of his remedy under the last distress. The only evidence adduced, of the rent being satisfied, has been extracted from the admission of *Ford*, that the goods distrained were *taken* by him at the amount of the appraisement. But if this is to be held a satisfaction of the rent, then I contend that this is not a case of reputed ownership; for as the bankrupt was in the Marshalsea prison during the whole time that intervened before his bankruptcy, the goods were never in his manual possession. Was there then such a dealing with these goods, or such a leaving them by the true owner in the bankrupt's possession, as can warrant the conclusion, that they were in the bankrupt's order and disposition at the time of his bank-

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ruptcy, when the actual possession was with the bankrupt's wife, and never with the bankrupt himself?

ERSKINE, C. J.—The Court entertains no doubt, that the order must be made pursuant to the prayer of the petition. Take the case, as if there had been no bankruptcy whatever, and as one merely between landlord and tenant; it is quite clear, that, viewing it in this light, the rent must be considered to be satisfied. But the landlord here, after distraining the goods, leaves them in the visible possession of the tenant, within the intent and meaning of the 72d section of the Bankrupt Act; for, being left in his house, and in the possession of his wife, they are to all intents and purposes in the legal possession of the bankrupt himself. If, indeed, the bankrupt had been criminally charged on any question connected with the possession of these goods, then the circumstance of his imprisonment might have operated in his favor. But on a question where civil rights only are concerned, his imprisonment does not destroy any of the incidents connected with the legal possession of property, though it may not be in his manual possession.

Sir A. PELL.—The possession of the wife in this case is the possession of the bankrupt, and the same when the bankrupt is in prison, as if he was on a journey. Here is a fraudulent attempt by the landlord to distrain the goods again, that he may procure for himself an undue advantage over the other creditors. When goods are improperly seized under an execution, the party entitled to them has a right to sue for the

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real value of the goods; and the same rule applies to this case.

Sir J. CROSS.—The landlord here has played fast and loose with these goods; he distrains twice for rent, and in each case contrives that the bankrupt should be the apparent owner, while he himself remained the real owner of the property. After the two first distresses there was no rent in arrear, upon his own admission, and when he took the goods afterwards, he took them for a rent falsely alleged to be in arrear.

Sir G. ROSE concurred.

Order made as prayed, after deducting the expenses of the levy.

Ex parte WYATT.

Lincoln's Inn. February 17.

Where the provisional assignee is directed to carry on the business of the bankrupt for the benefit of the creditors, the official assignee will be ordered to supply him with funds for that purpose.

THE bankrupt in this case had been a brewer, and it had been referred to the Commissioner to inquire, whether the business might not be beneficially carried on by the provisional assignee on behalf of the creditors.

The Commissioner certified, that the business might be so carried on until the 25th March, and for such further time until a sale could be effected of the brewery and implements of trade attached to the concern. The provisional assignee had accordingly carried on the business for the benefit of the creditors, and now applied to this Court by petition, that the official assignee

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might place at his disposal such monies belonging to the bankrupt's estate, as might enable him to carry on the business, which was ordered accordingly.

Lincoln's Inn. February 17 & 20.

Ex parte WILLIAM GREEN and SAMUEL LAWTON, in the matter of JAMES MADDERS.

W. & *T.* arrested *M.* & *S.* for debt, and shortly afterwards issued a commission of bankrupt against them; but, after proving their debt, abandoned the commission, in order to proceed against the bail in the action. They then obtained the joint note of *H.*, (one of the bail,) and of *M.* & *S.*, and compelled *H.* to pay the note; soon after which a second commission issued against *S.*, as surviving partner of *M.* After giving this note, the bail took an assignment from *M.* & *S.* of all their stock in trade, &c. as an indemnity against the consequences of becoming bail. Held, that none of these circumstances operated as a forfeiture of the debt of

THE petitioners in this case were the assignees of the above bankrupt, and the petition stated the following facts. Previously to the month of June 1829, the bankrupt carried on the trade of a machine maker and silk-throwster in copartnership with *William Madders*, his father, since deceased, under the firm of *Madders* & Son, at Congleton, in the county of Chester. In the month of June 1829, the firm of *Madders* & Son was indebted to Messrs. *Watson* & *Tyndale*, of London, in the sum of 254*l.* 2*s.* In order to secure to *Watson* & *Tyndale* the payment of this debt, an indenture bearing date the 15th June 1829, and made between *William Madders*, deceased, and the bankrupt of the one part, and Messrs. *Watson* & *Tyndale* of the other part, was duly executed by *William Madders* and the bankrupt; whereby several pieces of land and two dwelling-houses thereon, with a steam engine, and certain machinery thereunto attached, were assigned unto *Watson* & *Tyndale* for the residue of a term of 999 years; upon trust to sell the premises, in order to raise payment of the sum of 254*l.* 2*s.* and interest to *Watson* & *Tyndale*, after discharging two previous incumbrances of 300*l.* and 100*l.* owing to one *James Mills Woolfenden*, on

W. & *T.*, within the meaning of the 8th section of 6 *Geo.* 4. c. 16. Held also, that *M.* having died before adjudication under the first commission, *that* commission became null and void, without any writ of supersedeas. *Quære.* Whether, in case of such a forfeiture of the debt by the petitioning creditor, this Court can order him to pay over the amount to the assignees.

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the security of the same premises. In September 1829, *Watson & Tyndale* struck a docket against *William Madders* and *James Madders*, upon which a commission issued against them, bearing date the 30th September 1829. On the 29th October 1829, the commission was opened at Congleton, but the same was immediately adjourned *sine die*, and no further proceedings were had under the commission. Within a few days afterwards, an arrangement was come to between *Watson & Tyndale* and *William Madders* and the bankrupt, for securing to *Watson & Tyndale* the payment of their said debt of 254*l.* 2*s.*; in pursuance of which arrangement, *William Madders*, deceased, and the bankrupt, as principals, and *William Hodgkinson* as their surety, gave their joint promissory note, dated the 29th October 1829, to *Watson & Tyndale*, for the sum of 254*l.* 2*s.*, payable by instalments at six months and twelve months respectively, from the date thereof. On the 4th November 1829, an indenture of assignment between the said *William Madders*, deceased, and the bankrupt of the one part, and the said *William Hodgkinson* and one *James Cook* of the other part, was duly executed; whereby, after reciting that *William Madders* and the bankrupt had then lately been arrested by *Watson & Tyndale* for the sum of 253*l.*, and on that occasion had applied to *Hodgkinson* and *Cook* to become special bail for them to such action, which they had agreed to do; and that *Hodgkinson* had also become joined in the above mentioned promissory note, on having a security made to them to indemnify them from all losses which they might sustain in consequence thereof; it is witnessed, that in consideration of *Hodgkinson* and *Cook* having given bail, and *Hodgkinson*

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having become joined in such note, the said *William Madders* deceased and the bankrupt assigned unto *Hodgkinson* and *Cook* all their silk machinery, implements of trade, household goods, and furniture, upon trust to sell the same as soon as they should think proper, either by public auction or private contract; and as to the proceeds, in trust to pay the costs of the said assignment, and all outgoings, charges and expenses, and then to retain all such sums of money as they might be obliged to pay, in consequence of becoming such bail and joining in such note, and then to pay any surplus to *William Madders* & Son.

William Madders died on the 22d December 1829, and *James Madders,* the bankrupt, continued to carry on the business of a machine maker and silk throwster, as surviving partner. On the 14th June 1830, *Hodgkinson* sold by auction the whole of the property and effects comprised in the said indenture, and received the money produced by such sale; and from and out of the same, or out of his own monies, (as the petition went on to allege,) he paid to Messrs. *Watson* & *Tyndale* the amount of the monies secured by the said promissory note, in discharge of their said debt.

At the time of issuing the commission of the 30th September 1829, *Madders* & Son were indebted to the petitioner, *W. Green,* in the sum of 75*l.* 4*s.* 2*d.* and to the plaintiff, *Samuel Lawton,* in the sum of 100*l.*, and were also indebted to divers other persons; and the assets of *Madders* & Son, at the time of issuing such commission, were greatly insufficient to pay the creditors in full. Although *Watson* & *Tyndale* had been so paid the full amount of their debt, yet the petitioners had not, nor had any of the other creditors of

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Madders & Son,—except one *Goodall*, to whom a sum of 200*l.* was secured,—been paid or satisfied any part of their said debts.

A second commission of bankrupt, bearing date the 15th June 1830, upon the petition of *Samuel Lawton*, was duly awarded and issued against *James Madders;* and the petitioners went in under this commission, and proved their said debts under the same, and were duly chosen assignees of the estate and effects of the said *James Madders*, and the usual assignment of his estate and effects was executed to them by the major part of the Commissioners.

Under these circumstances, the petitioners were advised, that *Watson* & *Tyndale* had forfeited the whole of their debt, for securing the payment of which the said promissory note was given, and that they ought to repay the money so received by them for the benefit of the creditors of *William Madders* & Son and of the said *James Madders;* and that it was expedient and for the benefit of the petitioners, and the other unsatisfied creditors of *William Madders* & Son, that the commission of the 30th September 1829 should be superseded, and that the commission of the 15th June 1830 should be proceeded in.

Notice in the London Gazette was duly given of a meeting intended to be holden on the 25th of May 1831, under the said last mentioned commission, for the purpose of assenting to or dissenting from the assignees taking such steps at law or in equity, or otherwise, as might be necessary, for the due protection of the creditors of *William Madders* & Son. And at a meeting duly holden pursuant to such notice, it appeared, as the fact was, that the petitioners were the only cre-

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ditors of *William Madders* & Son, who had proved under the last commission. And that by an instrument under seal, dated the 18th January 1830, the Commissioners acting under the said commission, duly appointed the petitioners to receive from Messrs. *Watson* & *Tyndale* the amount of the monies so received by them as aforesaid, in respect of their said forfeited debt.

The petitioners, therefore, prayed for an order that the commission of the 29th September 1829 might be forthwith superseded; and that the Court would declare, that Messrs. *Watson* & *Tyndale* had forfeited the whole of their said debt of 254*l.* 2*s.*, and order them to repay the monies so received by them in satisfaction of their said debt, to the petitioners, and to execute to the petitioners a proper assignment and conveyance of the premises comprised in the indenture of the 15th June 1829, and to deliver up the same indenture to the petitioners. And that Messrs. *Watson* & *Tyndale* might also pay to the petitioners the costs of this application.

In answer to this petition, Messrs. *Watson* & *Tyndale* stated in their affidavit, that the debt of 254*l.* 2*s.* due to them from *Madders* & Son was on an acceptance given them by *Madders* & Son for goods sold and delivered. That in consequence of such acceptance not being paid when due, they sent down an agent to Congleton to obtain payment or security for the amount, who obtained from them the indenture of the 15th June 1829. That they were shortly afterwards informed by their solicitor, that he had discovered that on the 12th June 1829 *Madders* & Son had executed a security upon the same property to another creditor of the

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name of *Goodall*, for securing the payment of 200*l.*, after the arrangement had been agreed upon for the security to *Watson* & *Tyndale*, which was to have been subject only to a prior security in favour of one *J. M. Woolfenden*. In consequence of the discovery of the deception which had been thus practised on them, *Watson* & *Tyndale* arrested *Madders* & Son on a writ of latitat, and *Hodgkinson* & *Cooke* became bail in such action. But having afterwards been informed that the affairs of *Madders* & Son were in great embarrassment, *Watson* & *Tyndale* struck a docket against them, and *Watson* went down to Congleton for the purpose of opening the commission. Upon his arrival there, however, he was advised by Mr. *Pickford*, his solicitor, not to proceed with the commission, but to go on with the action, as the elder *Madders* was in such a state of health as would most probably induce the parties who had become his bail, rather to give security for the debt, than to be compelled to render him in their discharge. In consequence of this advice, *Watson* arranged with his solicitor, that the commission should be abandoned, if by threatening to continue the action he should find that the bail would give security for the debt; but previously to returning to London, he swore to his debt under the commission, to prevent the necessity of his attendance at Congleton again, in case security from the bail could not be procured. Some time after this Mr. *Pickford* obtained the joint and several promissory note of *Hodgkinson*, one of the bail, and of *Madders* & Son for the amount of the debt, payable by instalments; the first of which not being paid when due, *Watson* & *Tyndale* arrested *Hodgkinson*, who on the 9th of June 1830 paid that instalment, as well

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as the subsequent one when due. But *Watson* & *Tyndale* denied all knowledge of the security of the 10th November 1829, given by *Madders* & Son to *Hodgkinson*; and asserted that *Hodgkinson* was induced to sign the promissory note, solely, in order to avoid the necessity of rendering *William Madders* in discharge of the bail in the action. They also claimed to hold the indenture of the 15th June 1829, as a security for the costs and expenses incurred by them in respect of the proceedings commenced against *Madders* & Son.

Mr. *Wigram* for the petitioners. The question in this case arises on the construction of the 8th section of the 6 *Geo.* 4. c. 16. by which it is declared, " that if any trader liable to become bankrupt shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors," such payment shall be an act of bankruptcy; " and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, &c. or the full value thereof, to such person or persons as the Commissioners acting under such original commission, or any new commission, shall appoint, for the benefit of the creditors of such bankrupt." It is admitted in this case, that before the indemnity was given by the bankrupt and his late partner to *Hodgkinson*, a docket had been struck. The taking of this security, therefore, by *Hodgkinson*

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was of itself a forfeiture of the debt. It is true, that in *Ex parte Marshall* (*a*) it was made a question, whether a judge in bankruptcy had jurisdiction to make an order on the petitioning creditor to refund the money to an assignee under a subsequent commission, and Lord *Lyndhurst* ordered the party to bring his action; though the precise ground on which he made the order does not appear. But in *Ex parte Dimmock* (*b*), the Vice-Chancellor had no doubt of his jurisdiction, and made the order on the petitioning creditor for the re-payment of the debt. And in *Ex parte Brine* (*c*), also, which was a case under the former act of 5 *Geo.* 2. c. 30. s. 24. Lord *Eldon* said, that the act was imperative, and that he must declare the debt to be forfeited. Where the petitioning creditor's debt has been paid or satisfied, it is immaterial by whose hands such payment or satisfaction is made; the penal consequences are just the same.

Mr. *Jacob* and Mr. *Crowder* for the respondents. The petitioners in this case are the assignees under a commission issued against *James Madders* alone; *William Madders* having died in December 1829, and the transaction complained of, which took place so far back as October 1829, is only now brought forward. But previously to this transaction, namely in June 1829, the bankrupt and his partner gave to *Watson* & *Tyndale* a mortgage of their silk manufactory, to secure their debt of *254l. 2s.* At the time the promissory note was given, there was no adjudication of bankruptcy, nor did *Watson* & *Tyndale* know any thing about what took place afterwards between the bankrupt and *Hodgkinson.*

(*a*) 2 G. & J. 53, 265. (*b*) 2 G. & J. 261. (*c*) Buck, 19, 108.

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The points we rely on in opposition to the prayer of this petition are, 1. The delay of the petitioners in impeaching the transaction. 2. The petitioners should have resorted to a Court of law, instead of applying to this Court. 3. The transaction in question does not come within the act of parliament; first, because the security given was not out of the estate of the bankrupt; and secondly, because the compounding in this case was with two persons, one of whom is dead, and the commission now pending is only against the other.

1. As to the delay. The transaction sought to be impeached took place so long ago as the 29th October 1829, after which one of the persons (against whom the first commission issued) dies and a commission issues against the survivor in June 1830. There is no evidence of the date of the petitioning creditor's debt, except his own affidavit, which is nothing more than the mere *ipse dixit* of that party, who seeks to charge us with the money. But there is a certain time limited by law, in all cases, beyond which a penalty cannot be enforced. Thus, by 31 *Eliz.* c. 3. s. 5. a penalty, which is limited to a private individual, must be sued for within one year after the offence committed, though a penalty limited to the King may be sued for within two years. And by 24 *Geo.* 2. c. 44. s. 8. no action can be brought against a magistrate for any thing done in his official capacity, unless commenced within six calendar months after the act committed. Now here is a stale demand for a penalty claimed, not by the king, but by a subject, who has lain by a year and an half before he took any proceedings to enforce it.

2. The mode of proceeding in this case should have been by action at law, and not by petition in bankruptcy.

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In *Ex parte Brine* (*a*), which has been referred to by the other side, the party who struck the docket received the money from the bankrupt; and Lord *Eldon* merely declared the debt to be forfeited. But *Parsons*, the petitioning creditor in that case, presented a cross-petition, and offered to pay the money into Court. Therefore, *volenti non fit injuria*. And it has been decided also in *Ledbetter* v. *Salt* (*b*), that a petitioning creditor cannot dispute his own proceeding. In *Ex parte Paxton* (*c*), where the party compounding under the first commission had proved under the second, Lord *Eldon* only ordered the debt to be expunged. And a similar order was made in *Ex parte Brown* (*d*). The only two authorities, that have been cited in favour of the petitioners, are the cases of *Ex parte Marshall* (*e*), and *Ex parte Dimmock* (*f*). In the first of these cases the Vice-Chancellor thought he had no jurisdiction, unless another creditor had petitioned for a commission, on the ground of the secret composition; and Lord *Lyndhurst* did no more than direct the party to bring his action. In *Ex parte Dimmock*, the facts of which were nearly the same as in *Ex parte Marshall*, the Vice-Chancellor held, that the Court had jurisdiction to compel the repayment of the money received by the petitioning creditor. As the Vice-Chancellor, therefore, has given two contrary opinions, it is open to us to canvass the grounds on which they rest; and we contend that the last cannot be supported. But in both those cases there were prompt applications from the parties impeaching the transaction, and not such a delay as has occurred in this case. The 8th section, however, of the

(*a*) Buck, 19, 108.
(*b*) 4 Bing. 623.
(*c*) 15 Ves. 464.
(*d*) 15 Ves. 473.
(*e*) 2 G. & J. 53, 265.
(*f*) 2 G. & J. 261.

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6 *Geo.* 4. c. 16. does not say, that the Lord Chancellor shall order the money to be paid over. [*Sir A. Pell.* Neither does the act say, that the Chancellor is to declare the forfeiture of the debt, but yet he has power to do so. It would seem from the words of the 8th section, which empower the Lord Chancellor to issue a new commission, that he has power also to order the money to be repaid.] It will be found in other parts of the act, that where the Chancellor has the power to do any thing, such power is expressly given him by the statute. Thus in the 111th section, which relates to the payment of dividends, an express power is given to the Chancellor to order such payment; but there is no such provision to meet this case. Therefore the ordinary rules and remedies for payment of money, only, are applicable here. It might as well be said, that the Lord Chancellor is to try a matter of felony, because the act says, that when a party does certain acts, he shall be guilty of felony; as to hold that the Lord Chancellor may order the money to be paid over, because the act declares the debt to be forfeited. The proper mode of proceeding would have been for the assignees to have brought an action at law for money had and received, instead of coming to ask this Court to order the money to be paid over, on their own mere statement.

Part of the prayer of this petition is, that the commission of the 29th September 1829, issued against *William Madders* and *James Madders*, may be superseded. But, by the death of *William Madders* before adjudication, the first commission is absolutely void; for by the 26th section the Commissioners are only empowered to proceed in the commission after the bankrupt's death, where he dies *after adjudication*. [*Sir G. Rose.* You need not trouble yourself as to the

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prayer for a supersedeas; the first commission is gone already.] If that be so, then the power given to the Lord Chancellor by the 8th section does not apply to this case; for that section clearly contemplates an *existing* commission, which is supersedable; the words are, "the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue." Now, can either of those alternatives be acted upon, when one of the alternatives is gone by the act of God, namely, by the death of *William Madders?* The respondents here are neither parties nor privies to the second commission, nor have they ever admitted its validity. It would be unjust, therefore, to infer against them, without any inquiry, that this is a valid commission as to all its requisites, and that the assignees have been duly appointed. The 92d section only makes the depositions conclusive evidence, in proceedings by assignees for any debt or demand, for which the bankrupt might have sustained an action or suit; *Muskett* v. *Drummond* (*a*). But in this case the bankrupt could not have brought an action. The question of jurisdiction here goes to the whole merits of the case; it is not a mere matter of form, but the main point is, whether this Court shall carry into effect so highly penal a clause as the 8th section, or whether, when adverse rights are implicated, there should not be the usual form of a trial by jury. It is not improbable but that the debt of the petitioning creditor may have been reduced by subsequent payments, and therefore there may not have been a sufficient debt in amount to support the commission.

(*a*) 10 B. & C. 153.

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Mr. *Wigram*, on this point, referred to the case of *Shaw* v. *Harvey* (*a*), where Lord *Tenterden* held, that if there was a good petitioning creditor's debt at the time of the act of bankruptcy, on which a commission might have issued,—and there was also a petitioning creditor's debt still existing at the time of the commission,—it did not signify what happened in the interim, as to the payment of the items of the first debt, if the balance throughout continued sufficient for a petitioning creditor's debt.

Mr. *Jacob*. That was only a case decided at Nisi Prius, and the dictum cannot be supported, if the grounds of it be inquired into (*b*).

3. The composition in this case does not come within the act of parliament, because it was a composition with two persons, one of whom was not the object of this commission. The eighth section says, that the party shall repay the money to such person, as the Commis-

(*a*) 1 Mood. & M. 526.

(*b*) The grounds, on which the case of *Shaw* v. *Harvey* was decided, were, that there was a running account between the bankrupt and the petitioning creditor up to the time of issuing the commission, and that the balance was always against the bankrupt to the extent of 100*l*. and upwards. But it also appeared, that the amount of the balance due at the time of the act of bankruptcy was discharged by subsequent payments, made by the bankrupt before the issuing of the commission; for, there being no specific appropriation of any of these payments by either of the parties, the petitioning creditor was therefore bound to apply them in liquidation of the earliest balance due; *Simson* v. *Cooke*, 1 Bing. 461; *Clayton*'s case, 1 Meriv. 572; *Bodenham* v. *Purchas*, 2 B. & A. 39. Then, if the principle recognized by all the antecedent cases is correct, namely, that the debt of the petitioning creditor must be a complete and perfect debt *before* the act of bankruptcy, *Ex parte Charles*, 14 East, 197; 16 Ves. 256; *Buss* v. *Gilbert*, 2 M. & S. 70; the decision in *Shaw* v. *Harvey* does not appear to be sustainable; for no part of *the actual balance* due at the time of issuing the commission had accrued at the time of the act of bankruptcy.

sioners acting under such original commission, or any new commission, shall appoint. Now this must mean a commission against the bankrupt, with whom the composition has taken place. The section assumes, that the parties so compounding are bankrupt; but in this case one of the parties, *William Madders*, never was a bankrupt, for he died before adjudication. Supposing that both the parties against whom the first commission issued had died, the case would be clear; the charge could not in that case be made. Is this money then to go to the executors of *William Madders*, or to whom? or is it to go to the creditors of that party, who was the object of the first commission?

Then, as to the nature of this transaction. The party here has not taken money, or security, within the meaning of the act of parliament. The 8th section is confined to a case, where the party "may receive more in the pound in respect of his debt than the other creditors;" and the section goes on to direct, that the money shall be repaid to such person as the Commissioners shall appoint, "for the benefit of the creditors of such bankrupt." But who are the creditors under this commission, where there was no adjudication of bankruptcy? In this case, also, the property of *Hodgkinson* could not be considered as chargeable to the creditors. Nor could the statute ever have intended, where a friend of the bankrupt comes forward and pays the debt, or gives a mortgage to secure it, that this money or security was to be paid or delivered up to the creditors. The act says, that the person receiving the money or security is to *repay* it, that is, to *restore* it. In the 108th section, which provides, that no creditor having security for his debt shall receive upon such

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security more than a rateable part of such debt, the security there meant is a security given by the bankrupt, and not that of a third person. Now in this case the security given, as far as related to the bankrupt, was merely an enlargement of the time for payment; and it was the security of *Hodgkinson*, and not that of the bankrupt; consequently, it was not a satisfaction, or security, within the meaning of the act of parliament. And we have in fact received the money from a third person, and not from the bankrupt. [*Sir J. Cross.* Does not your argument go the whole length of contending, that the petitioning creditor may always take a collateral security from any third person?] In this case *Hodgkinson* has given us a note with his name on it for the payment of a sum of money, and we have enforced such payment. But what has that to do with the bankrupt? It is true, that the names of the two bankrupts are also affixed to the note. But will that make any difference, when not a shilling of the bankrupt's estate has been received by us. With respect to the assignment of the 4th November 1829, that is an assignment from the bankrupt to *Hodgkinson* and *Cook*, who had become his bail; but which we distinctly swear we had not the slightest knowledge of. Is it a singular proceeding, that a man, after becoming bail for another person, and joining in a promissory note, should require to be indemnified?

In *Ex parte Dimmock* (*a*), which has been cited on the other side, the petitioning creditor sold his debt to a person, who paid for it with the bankrupt's money. That was very different from this case. One part of the prayer of this petition is, that we should deliver up

(*a*) 2 G. & J. 261.

the deed of 15th June 1829. Now under this deed we were mortgagees; and this is not the place to come to to have the mortgage delivered up. If the petitioners have any claim to the possession of this deed, they must bring their action.

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Mr. *Wigram*, in reply. In order to prove a forfeiture of the debt in this case, I admit that I must show the party has been paid that debt out of the bankrupt's estate. Now it is stated in the petition, and not denied by the respondents, that on the 14th of June 1830 *Hodgkinson* sold the whole of the property assigned to him and *Cook* by the bankrupts, that he received the money arising from the sale, and that he afterwards paid the amount of the instalments secured by the promissory note. The proceeds of the sale of the bankrupt's property have therefore gone, substantially, into the pockets of *Watson* and *Tyndale*.

February 20.

The respondents, after denying generally the right of the petitioners to this money, say, they ought not to have come here. But there is no question about the jurisdiction. We do not seek to recover the debt, but what the respondents have improperly received. The words of the act are—" repay or deliver up." And it has never been decided, that the creditors, to whom the money is directed to be paid over, can sustain an action to recover it. The 100th section, which provides that all sums of money forfeited under the act may be sued for by the assignees in any court of record, does not exclude the jurisdiction of this Court. And the clause declaring the forfeiture in this case is mixed up with the power to supersede, and other powers which clearly belong only to this Court.

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Then, is this a security within the meaning of the act? It is contended on the other side, that the word "security" in the 8th section means a security from the bankrupt, and not one from a third person. But in *Ex parte Smith* (*a*), where the bankrupt had pledged the bond given to him by a third person, it was never suggested that this was not a security within the act. [*Sir A. Pell.* A reference to the 125th section will show, that the word "security" is used in different meanings in the act.] The principle of the bankrupt law is, to secure to every creditor an equal proportion of his debt; and the Court has always watched with jealousy the conduct of the petitioning creditor. The case of *Ex parte Paxton* (*b*) is a decided authority, that the money should be delivered up by the respondents. Where is the difficulty which should induce the Court to send this case to a trial at law, when there is no dispute that the creditor took this security after the docket was struck? It was the manifest intention of the legislature to give the Court sitting in bankruptcy the power to enforce this forfeiture. With respect to the argument urged against us of the delay, there is no case that decides that any particular time is limited to the assignees to assert their claim. But it is said, that we might recover the penalty twice, if we afterwards proceeded against *Hodgkinson* for it. The reason we do not go against him is, that the money has been actually paid over; therefore we are suing the right parties in this case, when we sue that party who has the money in his pocket, and when, in point of fact, the money has gone out of the bankrupt's estate. There is no necessity for a direct dealing between the bank-

(*a*) 2 G. & J. 105. (*b*) 15 Ves. 461.

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rupt and the petitioning creditor; for whatever has been received by virtue of any security out of the bankrupt's estate, the creditor is bound to bring it back to the estate. And the 8th section, which was intended to be a remedial clause, would become entirely a dead letter, if the Court should decide in this case, that the party here is not compellable to refund.

ERSKINE, C. J.—It is unnecessary in this case to give any opinion as to the jurisdiction, though I should feel no difficulty on that part of the question; but it appears to me, that the petitioners have not made out their case in point of fact. Looking at the whole of the 8th section together, the object certainly was, to prevent the petitioning creditor from taking more than his fair proportion of the property of the bankrupt. If the petitioners had proved, that the security given to *Hodgkinson* was a mere contrivance to do that indirectly, which the act prevented from being done directly, then there would be no doubt as to the order the Court would make; but the petition merely alleges in the alternative, that *Hodgkinson* paid *Watson* and *Tyndale* the amount of their debt, *either* out of the money produced by the sale of the property of the bankrupts, *or* out of his own monies. This is not a sufficient allegation to induce the Court to make any order for the repayment of the money; for it ought to be satisfied before it makes such order, that the money was paid out of the estate.

Sir A. PELL.—The argument in this case has taken a very extensive range. If the application had been made under the first commission against *Madders* and

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Son, then I conceive this Court would have had direct jurisdiction over the matter. But the original commission is gone, and there is no new commission against the same parties as those named in the first commission. Therefore the petitioners cannot, I think, claim the interference of the Court under the 8th section; for where a penalty is imposed, (if this be a penal clause,) the Court is not to go out of its way, by subtlety, to bring a case within it. The object of the clause, I admit, is to give *festinum remedium*. But there is another difficulty that has struck my mind. The promissory note is dated 29th October 1829, and is given by *Hodgkinson* jointly with *Madders* and Son. But the statute contemplates a payment by, or satisfaction or security given by, the *bankrupt*. Then what satisfaction has there been by *Madders* and Son in this case? The cases cited were all cases of payment of money; while here nothing is given but a note, which is not paid by the bankrupt, but by another person. I do not mean to give a decisive judgment on the question of jurisdiction; but when I read the whole language of the 8th section, I am strongly inclined to think that the Court has no jurisdiction, under the circumstances of this case.

Sir J. CROSS.—It is admitted by the Counsel for the petitioners, that they have no right to an order for repayment of this money, unless they can prove that it was paid out of the estate of the bankrupt. Now, as no evidence of this kind has been offered, I think that the petitioners have not made out their case. But even if they had, as *Hodgkinson* and the representatives of *Wm. Madders* are not before the Court, I think we should have no power to make the order as prayed.

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Sir G. ROSE.—When a party proving a debt under a commission swears that he has no security or satisfaction for his debt, except what he states at the end of his deposition, this will best explain the meaning attached to the words " satisfaction or security" mentioned in the 8th section. On no part of the prayer of this petition are the assignees, in my opinion, entitled to relief. They have no right to petition for a supersedeas; for the old commission was void by the death of *Wm. Madders*, and it might be superseded, as a matter of course, by application at the Bankrupt Office. Besides, the representatives of *Wm. Madders*, as well as *Hodgkinson*, ought to be before the Court. And even if the prayer for the supersedeas could be entertained, the bankrupt should also in that case have been brought before the Court.

Petition dismissed with costs.

In the matter of FLY.

Lincoln's Inn, February 20.

MR. *SWANSTON* applied to the Court for an order on the Secretary of Bankrupts to attend a trial that was expected to come on this day, with the docket papers and other proceedings deposited with him on issuing the fiat in the above bankruptcy.

The Secretary of Bankrupts is no Officer of the Court of Review, but of the Lord Chancellor.

The Court made the order, but intimated that it must be subject to the approbation of the Lord Chancellor, as the Secretary of Bankrupts was no officer of the Court of Review, but one over whom they had no control.

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Southampton Buildings, February 27.

A creditor, resting upon a common law lien, without proving under the commission, previous to the Bankruptcy Court Act, appeared as a *respondent*, in opposition to a petition before the Vice-Chancellor, who ordered that the matter should be referred to the Commissioners, to ascertain the rights of the several parties, and that the creditor should have his costs. The creditor attended the inquiry before the Commissioners, but did not draw up the order of the V.C. Held, that this was not enough to bring him within the jurisdiction of the Court.

Held also, that filing an affidavit is not a waiver of any objection to the jurisdiction.

The clerk of a creditor, claiming as equitable mortgagee, drew up and signed the memorandum accompanying the deposit of a lease by the bankrupt; but it was not signed by the bankrupt himself, nor was it alleged that the clerk was authorized by the bankrupt to draw up such memorandum, or that it was ever shown to the bankrupt:—Held, under these circumstances, that the equitable mortgagee was not entitled to the costs of the sale.

Ex parte REID and others, in the matter of MILLS.

THIS was the petition of the equitable mortgagees of two leasehold public-houses held by the bankrupt, praying for a sale of the property, and that the licences granted in respect of them, which the bankrupt had deposited with Messrs. *Price* and *Wakelin*, his solicitors, might be delivered up by those gentlemen, as being deposited with them after the act of bankruptcy. But the material question that occurred in the course of the argument was, whether Messrs. *Price* and *Wakelin* could be brought within the jurisdiction of the Court, so as to justify any order which the Court might think proper to make on them.

It appeared, that the bankrupt had deposited with the petitioners the lease of the Leopard public-house, to secure an advance of 500*l.*; and in consideration of a further advance of 200*l.* he had also deposted with them an agreement for a lease of the Lamb and Flag public-house; but when he obtained this lease, he fraudulently deposited it with one *Brown*, for money borrowed of him. The licences for these two public-houses the bankrupt had also deposited with *Price* and *Wakelin*, to secure them the amount of their bill of costs, as well as advances in money made by them for the bankrupt. A former petition in this matter had been heard before the Vice-Chancellor, who ordered a reference to the Commissioners, to ascertain the rights of the respective parties. The Commissioners reported, that *Reid* & Co. were the equitable mortgagees of these public-houses, subject, however, to a prior equitable mortgage to *Brown*

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(as to the Lamb and Flag) for 500*l.*; and they also found, that *Price* and *Wakelin* were in possession of the licences, on which they claimed a lien of 108*l.* 0*s.* 2*d.*

Mr. *Koe* and Mr. *Swanston*, for the petitioners. The licences are instruments on which no lien can possibly attach, as they cannot be regarded as symbols of property. The Commissioners, though they report that *Price* and *Wakelin* claimed a lien, do not determine that they really had a lien on the licences. [*Sir A. Pell.* The licences in themselves are not worth one farthing; for unless they are assigned by the magistrates to the in-coming tenant, they are of no use whatever; it being provided by act of parliament, that no new tenant of a public-house can avail himself of the licence, without such an assignment.] On the inquiry before the Commissioners *Price* and *Wakelin* stated, that they did not know, in the beginning of February, of any act of bankruptcy committed by the bankrupt; although they had actually, on the 10th January preceding, signed and delivered, as attornies for one of the parties in an action then pending, a notice that the bankrupt had previously committed an act of bankruptcy. [*Erskine*, C. J. Will you address yourself to the important fact, whether *Price* and *Wakelin* are brought in any way before the Court?] At the hearing of the former petition before the Vice-Chancellor, they first objected to the jurisdiction, but afterwards submitted, on condition of having their costs. The order made by the Vice-Chancellor directed the Commissioners to inquire, if any, and what sum of money was claimed by *Price* and *Wakelin;* who went in under this inquiry, and made an affidavit as to the circumstances of their claim;

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so that they attended the hearing of the petition, as well as the inquiry before the Commissioners. It is competent to the purchaser of an estate to submit to the jurisdiction, and when once he has submitted, it is not competent to him to withdraw from it. But *Price* and *Wakelin* have also made an affidavit in answer to this petition, which prays for the delivery up of the licences. [*Sir G. Rose.* They compromised themselves in no way by submitting to the inquiry. *Erskine,* C. J. And their making an affidavit does not bring them within the jurisdiction.] Although the affidavit may not give the Court jurisdiction, the contents of it at least furnish evidence of the construction they put upon the Vice-Chancellor's order. We contend, that the Vice-Chancellor's order on the former petition could only have been made with the concurrence of *Price* and *Wakelin.* The prayer of that petition, indeed, was partly addressed to the very claim that *Price* and *Wakelin* now set up. [*Sir G. Rose.* Have you any case, where the Court has exercised a jurisdiction over a party who is merely a *respondent?* There are many cases as to jurisdiction over petitioners. *Sir A. Pell.* It is quite clear, that when the parties went before the Commissioners, they intended to submit whether they had a lien or not in these licences, which is the very question now to be decided.] It is also clear, that if they had objected to the jurisdiction on the hearing of the former petition, the Court would have dismissed the petition, and perhaps with costs. But this not having been done, shows plainly that the Vice-Chancellor entertained jurisdiction. There is no medium. If the petition was not dismissed with costs, the Court must have exercised a jurisdiction over the

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party who objected to it. And we find that it did so, by making an order that they should have their costs; for an order of this description does not amount to a dismissal with costs. Such an order, in fact, amounted to nothing but an indemnity to them for submitting to the jurisdiction. The Court provided a course by which the question should be decided, and consequently assumed the jurisdiction.

Mr. *Jacob*, for the assignees, disclaimed any particular interest which they might be supposed to have in this question, except that it was desirable that the licences should be in the possession of the party entitled to the house, as the property would then fetch a better price at the sale.

Sir A. Pell (after explaining the way in which the beer licence and spirit licence were granted to a publican, on the certificate of the magistrates to the Excise Office,) observed, it was a fallacy to suppose, that any one who had the brick and mortar of the house was entitled to the possession of the licence, or could derive any material advantage from it, even if he had it. Suppose an action of trover should be brought for this licence, and the magistrates refused to renew it; what value could be put upon the licence, and by what means could the measure of damages in such case be ascertained? The only mode in which the possession of a licence can be considered valuable is, that it is a document, on the authority of which the magistrates will in general grant a new licence.

Mr. *Montagu*, for *Price* and *Wakelin*. It is quite

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clear, that we are not concluded from objecting to the jurisdiction, by filing an affidavit as to the merits. *Ex parte Allison*(*a*). We were bound to do so, both on this and the former occasion. The very money paid for obtaining these licences was advanced by *Price* and *Wakelin*, and they would have been wanting in duty to themselves, and respect for the Court, if they had not made an affidavit. On the former petition before the Vice-Chancellor I mentioned the case of *Ex parte Jackson*(*b*), where Lord *Loughborough* held, that the Lord Chancellor had no authority in bankruptcy to compel a second mortgagee, not claiming under the commission, but resting on his security, to join in a sale obtained by a prior mortgagee. The Vice-Chancellor was clear, in this case, that he had no jurisdiction; and in the conclusion of the order made by him on that occasion, he directs the costs of the petition to be paid to *Price* and *Wakelin*, reserving the question as to *the party by whom* the costs shall be paid. Mr. *Swanston* has argued this case, as if the Vice-Chancellor had bribed the parties to submit to the jurisdiction, by making the order in that form with regard to the costs, as a sort of premium to induce a refractory party to consent. But the Court would never have entered into a contract of barter, with either the petitioners, or respondents. Then, as to going before the Commissioners, no submission can be implied from this circumstance; for when a party is summoned before a Court that has a right to interrogate him, he cannot help himself. It is true, that *Price* and *Wakelin* issued this commission as solicitors to the petitioning creditor; but they are not now solicitors to the commission; and the circumstance of their having been so

(*a*) 1 G. & J. 210. (*b*) 5 Ves. 357.

will not give the Court jurisdiction over them. [*Sir A. Pell.* Supposing *Price* and *Wakelin* had submitted to the Lord Chancellor the question whether they had a lien or not, and the Chancellor ordered an inquiry before the Commissioners to ascertain that fact, and the Commissioners found they had no lien, and an action of trover was brought against *Price* and *Wakelin* for these licences, would not the finding of the Commissioners be evidence in such action?] We asked nothing but our costs before the Vice-Chancellor, and when before the Commissioners we only wanted to be released as soon as possible. In *Ex parte Bennett* (*a*) there was a consent to the jurisdiction; but even there Lord *Eldon* at first refused to entertain it, though he ultimately exercised it. [*Erskine*, C. J. Does he not in *Ex parte Hall* (*b*) say, that where there is a consent, he will exercise jurisdiction?] But in this case, where there is nothing approaching to a consent, I submit that the Court can exercise no jurisdiction over a party who merely rests on his security, and makes no claim whatever under the commission.

Mr. *Jeremy* appeared for the representatives of *Brown*.

Mr. *Koe*, in reply. If, on the former hearing, any apprehension had been entertained that these parties would have withdrawn from the jurisdiction, the order of the Vice-Chancellor would have effectually provided that they should not do so. It is said, that no inference is to be drawn from the terms in which the order is drawn up. But there can be no doubt, that the Court did really intend to exercise a jurisdiction upon the

(*a*) 10 Ves. 381. (*b*) 1 Rose, 13.

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result of the inquiry directed before the Commissioners; which inquiry embraced this claim of *Price* and *Wakelin*, as well as other matters connected with the bankrupt's property. Upon whom, then, is the jurisdiction to be exercised, if not over *Price* and *Wakelin*? [*Sir A. Pell.* Is it not the simple course, that where a party is brought before the Vice-Chancellor, and he says he has no jurisdiction, that the petition, as to that party, is dismissed with costs?] That was the very thing he did in *Ex parte Allison* (*a*), which has been cited on the other side. The payment of costs, as ordered by the Vice-Chancellor in this case, was only up to the hearing of the former petition. It could never be intended, that the party to whom they were to be paid, and who was implicated in the result of the inquiry on that occasion, should be discharged from all future liability. Nor will the Court permit a party, who has availed himself of that order, and had the benefit of an inquiry before the Commissioners, to turn round now and dispute the jurisdiction.

ERSKINE, C. J.—It is not pretended in this case, that the Court had any original jurisdiction; but it is alleged, that the party has submitted to it, and that he is bound by such submission, as well as by taking a part in some subsequent proceedings. There is no doubt, that the Lord Chancellor, sitting in bankruptcy, had jurisdiction over parties after they had once consented to it. This point is expressly decided in *Ex parte Hall* (*b*). Then it comes, after all, to a question of fact, whether *Price* and *Wakelin* assented to the jurisdiction on the former occasion; for if that was the

(*a*) 1 G. & J. 210. (*b*) 1 Rose, 13.

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case, they cannot now withdraw from it. But the petitioners were bound to establish this fact. It is true, that costs were ordered to be paid to them by the Vice-Chancellor's order; but as that order was not drawn up by *Price* and *Wakelin*, I think it would be too much to infer they have submitted to the jurisdiction, because they have derived some benefit from that order. It does not appear, that the merits of the case were gone into on the former occasion, nor do *Price* and *Wakelin* appear to be any parties to that order. With respect to their having filed an affidavit, it was expressly decided in *Ex parte Allison* (*a*), that a party objecting to the jurisdiction has a right to come prepared in the alternative, and that he is justified in stating the merits of his case, lest his objection to the jurisdiction should fall to the ground. And as to the examination of *Price* and *Wakelin* before the Commissioners, that proceeding was entirely compulsory; for they could not have declined attending, after being summoned so to do.

Sir A. Pell.—I have placed myself in this case in the situation of a jury, to decide upon a particular fact. The whole of this inquiry would have been saved, if the Vice-Chancellor had only ordered that part of the former petition, which affected *Price* and *Wakelin*, to be dismissed with costs. But, inasmuch as there was no jurisdiction in the Vice-Chancellor, are we not compelled to say, that this Court cannot, on this petition, entertain jurisdiction? I do this very reluctantly; but I do not think that the petitioners have entirely made out the case they were bound to prove,—namely, that

(*a*) 1 G. & J. 210.

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of a previous submission to the jurisdiction by those parties, who now think proper to dispute it.

Sir J. Cross.—This is a dispute between two creditors, neither of whom has proved under the commission; and therefore it is quite clear, that this Court can exercise no jurisdiction over them, unless they have done something by which they are concluded from objecting to it. But it is said, that these parties have waived all objections to the jurisdiction, by appearing on the former petition, by attending the inquiry before the Commissioners, and by making an affidavit in answer to this petition. The question of jurisdiction has, I am ready to admit, been left a little open, by the practice of the Court on former occasions. But I am of opinion,—though I come to this decision with some degree of reluctance,—that the petitioners have not satisfactorily made out, that the respondents have waived their right of objecting to the jurisdiction.

Sir G. Rose.—The petitioners in this case call upon a party having a common law lien,—and who rests upon that lien, without coming in as a creditor under the commission,—to answer the allegations in their petition, which seeks to invalidate the rights attaching to such lien. The common course is, to dismiss such a petition with costs, when the party has done nothing to submit to the jurisdiction. But it is also not uncommon for a party, who is improperly brought before the Court, to insist upon having his costs. It is one thing to say, that a solicitor, a party to the commission, shall be subject to any order of the Court, in respect of his claims on the bankrupt's property; and another to

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hold, that a solicitor, who is no party to the commission, but one who merely rests upon a common law lien, is bound to obey such order. The Court has never exercised a jurisdiction to deprive him of his legal title. He stands upon stronger ground, than a mere equitable mortgagee. Supposing the assignees had thought proper to claim these papers, and had petitioned the Court for an order that they should be delivered up to them; would this Court have exercised a jurisdiction over a party who claimed a common law lien, even though he had proved a debt under the commission? For though his proof would have made him amenable to the jurisdiction, he would only have come before the jurisdiction to a certain extent, that is, as to all matters connected with his proof; and not as to any distinct lien he might have, at common law, upon other portions of the bankrupt's property.

Mr. *Jacob*, for the assignees, then objected to the petitioners being allowed their costs of the sale, as there was no proper memorandum in writing accompanying the deposit of the lease, but merely a memorandum signed, not by the bankrupt, but by a clerk of the petitioners. [*Erskine*, C. J. Does he state that he made this memorandum by the authority of the party depositing the lease?] No such thing; nor is it even alleged, that the memorandum was ever shown to the party depositing the documents.

Mr. *Koe* and Mr. *Swanston*. The memorandum and deposit were contemporaneous, and merely constituted one act. The clerk, who signed the memorandum, was the agent for both parties. [*Sir J. Cross*. He has

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alleged that he was the agent for one party, but says nothing about the other.] He was employed to negociate the transaction between the parties; and it appears from the affidavit, that the memorandum was drawn up at the house of the bankrupt. A memorandum, though defective as an agreement, may nevertheless be sufficient to entitle the party to costs. *Ex parte Brightwen* (*a*).

The Court decided, that the petitioners were not entitled to the costs of the sale; and ordered the petition to be dismissed with costs, as to *Price* and *Wakelin*, and the costs of the inquiry before the Commissioners to be paid by the respective parties (*b*).

(*a*) 1 Swanst. 3.

(*b*) See *Ex parte Reid*, Mont. & M. 114; *Ex parte Vauxhall Bridge Company*, 1 G. & J. 101; *Ex parte Warry*, 19 Ves. 472.

Southampton Buildings, 28 *Feb.* 1832.

Ex parte John Michael Shum.—In the matter of James Ennis Rose.

A single creditor, who petitions to supersede a commission on the ground of fraud and collusion, must also pray, that a new fiat may issue. Or, without petitioning to supersede, he may pray for the removal of the assignees, and for others to be chosen in their room. If his petition is merely to supersede, it will be dismissed with costs.

THE bankrupt in this case was a trader at *Bath*, where most of the circumstances stated in the petition took place. The petitioner was a creditor of the bankrupt, and prayed, *merely*, that the commission might be superseded.

The facts as stated in the petition were, that on the 6th of December 1831 *James Sheppard* swore the affidavit of debt for striking the docket before *Mackay* a solicitor, and the execution of the bond was also attested by him. The debt was alleged to be upon

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a bill of exchange dated 19th March 1831, payable thirty-two weeks after date, for £200, drawn by *John Keys* on and accepted by the bankrupt, and indorsed to *J. Sheppard.* The bill became due on the 1st November 1831, and was renewed by a bill for two months; but the original bill was not returned to the bankrupt, and he had never been applied to for payment of it. *J. Sheppard* was brother-in-law of *John Keys,* and the petitioner verily believed that *John Keys* passed the original bill to *J. Sheppard,* for the purpose of enabling *Sheppard* to strike a docket against the bankrupt, and that *Sheppard* had not given value for the bill. *Mackay* was the solicitor for *Keys,* and the petitioner believed him still to be so. The docket was struck on the 8th December. On the 6th December *Keys* caused judgment to be entered up, and execution to be issued on a warrant of attorney given by the bankrupt. The attornies, to whom such warrant of attorney was directed, were *Graves* and *Mackay,* who employed the same agents, both in respect of the warrant of attorney and the commission, and the proceedings under both went on in concert together, and at similar times. Execution was levied on the goods of the bankrupt on the 9th December; but the warrant of attorney was not filed within twenty-one days, nor until the 6th December. The act of bankruptcy was not committed till the 9th December; and although *Sheppard,* in his affidavit of debt of the 6th December, swore to his belief that the bankrupt had then committed an act of bankruptcy, which was not the fact; and although the docket was struck on the 8th December, *Mackay* did not order his commission, or send up the usual certificate as to the proposed Commissioners' names, until the 10th Decem-

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ber, nor was the commission bespoke by his agents in town before Monday the 12th December. The petitioner believed, that the docket was struck by *Sheppard* at the instance of *Keys*, and that *Keys* levied his execution under the warrant of attorney on the 9th, to compel the bankrupt to commit an act of bankruptcy, in order to enable *Sheppard* to prove that fact before he bespoke his commission. It was alleged, that *Mackay* was also the solicitor to the commission, and that *Graves*, who was one of the Commissioners, was also the attorney employed in levying the execution; and that the whole transaction, as to the warrant of attorney and the commission, was a concerted scheme between *Mackay*, *Graves*, *Sheppard*, and *Keys*, to get the entire management of the estate and effects of the bankrupt into *Keys*' control, to the injury of the other creditors.

The commission issued on the 15th December; and it was further alleged, that *Graves*, although a Commissioner, was also a creditor of the bankrupt for the amount of a bill of costs for business done as an attorney. That *Wyndham Goodden*, Esq., a barrister, was excluded from being placed on the said commission by fraud, in order to enable *Graves* to act as such Commissioner, who, although acting as attorney for *Keys* the execution creditor, adjudicated under the commission. That the party proving the act of bankruptcy was also a creditor, and that unless the commission was superseded, the petitioner believed that the other creditors of the bankrupt would not share equally or fairly with *Keys* the produce of his estate and effects. (*a*).

(*a*) There were affidavits filed by the parties implicated, in answer to the facts alleged in the petition; but the substance of them is afterwards stated in the judgment of the Chief Justice.

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Mr. *Twiss* and Mr. *Montagu*, for the petition, contended, that this was throughout not merely a concerted commission, and as such supersedable, but was also collusive in its institution as well as in the working of it. All the parties were acting in double capacities, each inconsistent with the duties required in the other. Here was no valid petitioning creditor's debt, the affidavit being sworn on a retired bill of exchange. The act of bankruptcy was proved by a creditor. One of the Commissioners was a creditor, which was directly contrary to Lord *Eldon*'s general order (*a*); and a barrister was also excluded from the commission, which was also contrary to Lord *Loughborough*'s order (*b*). The whole proceeding was a fraudulent stratagem to defeat the just claims of the general creditors, and so contrived, as to place the power over the execution and the commission in the hands of the same party, to enable him to act for his own benefit throughout.

Mr. *Jacob* and Mr. *Bethel*, for the respondents, were stopped by the Court.

Sir G. ROSE.—How can a single creditor come to supersede a commission, on the ground of fraud or collusion, without praying that a new commission may issue? But you need not have asked for a supersedeas; it would have been sufficient to pray, that the assignees might be removed, and others appointed in their place.

Sir A. PELL.—If the objection, that the party proving the act of bankruptcy is at the same time a creditor, be not taken before the Commissioners, I have always

(*a*) 25th July, 1817. (*b*) 12th August, 1800.

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understood, that it could not be relied on at any subsequent period (*a*).

Erskine, C. J.—It certainly appears to me, that the petitioner has not, upon his own showing, made out a case sufficient to justify the interference of the Court. Though we have not thought it requisite to hear the counsel for the respondents, yet there do appear to be many circumstances of a very suspicious character surrounding both the issuing, and the mode of working, this commission; and if this had appeared to us to have been a petition *bonâ fide* presented by a creditor, praying such relief as would seem to be for the advantage of the general body of creditors,—as for instance, that a new commission might issue in lieu of this,—I, for one, should certainly have had a strong inclination, from the facts which we have heard stated, to do every thing in furtherance of the objects of such petition. But what is here the case? The prayer of this petition, and the circumstances under which it is presented clearly show, that this is the petition of the bankrupt himself. For what benefit can the ostensible petitioner derive from a supersedeas, the only proceeding that he asks for? It seems to be admitted, also, that the effects taken under the execution have been since given up to the assignees, and are now therefore distributable under the commission for the general benefit of the creditors. Four objections are taken:—1st, That there is no good petitioning creditor's debt: 2d, That *Graves*, who is acting as a Commissioner, is also a creditor: 3d, That *Graves* is also the solicitor acting for *Keys* under the execution: and 4th, That Mr. *Goodden*, a barrister, was never pro-

(*a*) See *Ex parte Hills*, Mont. & M. 272.

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perly summoned to act as a Commissioner. As to the first objection, if there is proved to be no good petitioning creditor's debt to support this commission, whatever might have been the motives of the party in issuing it, the commission must fall to the ground. But I apprehend, that that fact is not sufficiently made out; for by the affidavits filed on the part of the respondents, it is distinctly sworn, that the debt was on a bill indorsed in September 1831; and this is not sufficiently disproved on the other side; therefore that objection seems to be removed. As to the second objection, the circumstances seem very doubtful. By the respondents it is alleged, that the debt of 12*l.* owing to *Graves* for preparing the warrant of attorney was paid by *Keys*, before *Graves* acted as a Commissioner; and in the affidavits it is stated, that *Keys* is the party liable, and the one applied to, having undertaken for the payment of the debt. *Keys* is therefore the creditor of the bankrupt, and not *Graves*. The third objection now falls to the ground, inasmuch as the execution is given up, and all motives for future misconduct are at an end. At the same time I think it would become Mr. *Graves*, as a duty which he owes to his own character and to the public, to retire from this commission; unless the refusal of other qualified persons in the neighbourhood to act should render it necessary, that he should continue to act as a Commissioner. I do not, however, wish it to be understood that I condemn Mr. *Graves* as unfit for the situation of a Commissioner in other cases; we have not yet heard him, but I think he ought to retire from this commission. The fourth objection is not very distinctly made out, and will not now hold, more

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especially as a ground for destroying a valid commission, on a petition with such a prayer as the present; a petition evidently that of the bankrupt, without any prayer for a new commission, or to displace the assignees, and wholly unsupported by the other creditors. Upon the whole, therefore, I think that this petition ought to be dismissed, and with costs, as the petition is so informally brought before us.

Sir A. PELL.—I fully concur in the judgment of his Honor the Chief Justice, and have during the whole argument been struck with the justice of the objection first started by his Honor Sir G. ROSE, namely, that this petition was presented for the individual advantage of the bankrupt, and not for the general benefit of the creditors. As such, the prayer of it cannot be granted. With respect to costs, he yielded with reluctance to the decision that they must be paid by the petitioner; for, to say the least, there were very suspicious circumstances attending the whole case.

Sir J. CROSS, and *Sir* G. ROSE, concurred.

The petition was therefore dismissed with costs.

Ex parte WILLIAM SMITH and CHARLES WILDING JONES, Assignees of JAMES MARSH, a Bankrupt.—In the matter of ISAAC MARSH.

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Southampton Buildings, February 28.

Assignees, applying to prove, are not bound by the same *laches*, as might bind a mere individual creditor.

THIS was a petition by assignees under one commission to prove a debt under another, and for staying the payment of dividends.

It appeared, that a commission issued against *James Marsh* on the 13th June 1831, and that the petitioners were appointed his assignees. On passing his examination he stated, that his son *Isaac Marsh* was indebted to him in the sum of 934*l.* 11*s.* 1*d.*, on the balance of account for money lent and advanced; and *Isaac Marsh* having also become bankrupt, the petitioners forwarded an affidavit to the solicitors under *Isaac Marsh*'s commission, claiming to prove such sum against his estate; but the admission thereof was adjourned for examination. On the 25th of September 1831 the petitioners' solicitor received a letter from the solicitors under *Isaac Marsh*'s commission, stating, that the Commissioners considered this claim so suspicious, that they had declined to receive it, until every item therein could be vouched by proper documents. But the solicitors stated their readiness to enter into an investigation of the account, so that the several points might be ready to be submitted to the Commissioners at their next meeting. And they added, that no dividend meeting was then appointed, but that an audit meeting was fixed for the 9th December 1831; at which, however, no debts could be proved; and that a dividend would depend on the assets declared upon such audit.

The petitioners were not aware of any dividend meeting under the estate of *Isaac Marsh*, until the 5th January 1832; when the solicitors of the petitioners

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were informed by the other solicitors, that a dividend of 7*s.* 9*d.* in the pound had been declared; but that the debt of the petitioners had not been allowed, as the Commissioners still remained of their former opinion. The petitioners had at that time caused an advertisement to be inserted in the London Gazette, for a meeting of creditors of *James Marsh* to be held on the 12th of January 1832, to authorize them to take proper measures for investigating and submitting the said claim for proof; and they caused immediate notice to be given to the solicitors under *Isaac Marsh*'s commission, to withhold the payment of the dividend, on the ground that the petitioners meant to petition this Court, to have this claim submitted to the Commissioners for investigation and proof; and the payment of the dividend was in consequence withheld. The petitioners were duly authorized by the creditors of *James Marsh* to prosecute this claim, at the meeting of 12th January.

The petition therefore prayed, that the Commissioners might be directed to inquire into and investigate the said claim, and admit the same, or such part thereof as might be found correct, for proof and dividend; and that the payment of the said dividend of 7*s.* 9*d.* might be delayed, until such investigation was had.

In answer to this petition, an affidavit was made by a clerk to Messrs. *Amory* & *Coles*, the solicitors to the commission against *Isaac Marsh;* which stated, that on the 5th of August 1831 the third meeting was held for passing the bankrupt's last examination; at which meeting the deponent presented to the Commissioners the affidavit and account forwarded by the petitioners, when they ordered the proof to stand over for examination, and a private meeting to be appointed for the

examination of the parties thereon; of which decision, and the meeting appointed in pursuance thereof, the deponent informed Messrs. *Crossley* & *Sudlow*, the solicitors of the petitioners, by letter sent the same evening. That the deponent was informed, that the bankrupt, *Isaac Marsh*, was then examined, but that no person appeared on behalf of the petitioners, in support of the proof, nor did *James Marsh* attend to be examined. That on the 22d September following Messrs. *Crossley* & *Sudlow* wrote to Messrs. *Amory* & *Coles*, requesting to hear from them, as to what had been done with the proof, and to be informed when the dividend meeting would be. In reply to which, Messrs. *Amory* & *Coles* on the 24th September 1831 wrote a letter, of which the following are extracts:—

"There is not any public meeting appointed at present, as it regards the claim made by the assignees of *James Marsh*. The Commissioners, after examining the bankrupt thereon, considered the account of so suspicious a nature, that they have declined to receive it, until every item therein be vouched by proper documents. The bankrupt has no account whatever with his father in the books, and there are bills of exchange and joint promissory notes, bearing the name of the father, being proved under the son's estate, and which we presume are charged in the father's account as remittances to the son, although never met at maturity, by either party. Indeed, so far as the accommodation between them goes, the party would only be entitled to prove the amount of dividends his estate has paid upon them, and not for the whole amount of the bills. We are ready to enter into an investigation of this account, in any way you may suggest, that we may have our several

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points ready to submit to the Commissioners at their next sitting. There is no dividend meeting appointed; the nominal audit meeting is fixed for the ninth December next; *but no debts can be then proved.* A dividend will depend upon the assets declared on the audit."

The deponent further stated, that notwithstanding such communication the petitioners did not, nor did Messrs. *Crossley* & *Sudlow*, or any other person on their behalf, proceed to substantiate their claim on the required investigation, by the production of vouchers and documents, in confirmation of the accounts; nor did Messrs. *Amory* & *Coles* receive any reply to such letter. That on the 3d January last a meeting was held under the commission against *Isaac Marsh*, in pursuance of advertisement in the London Gazette, to declare a dividend; at which meeting deponent attended, and stated to the Commissioners then present the substance of the examination of the bankrupt respecting the said debt, and the correspondence that had taken place on the subject, and produced to them the affidavit and account of the said *James Marsh;* after consideration of which documents the Commissioners rejected the proof, and declined to permit any claim to be entered upon the proceedings; inasmuch as the petitioners, through their solicitors Messrs. *Crossley* & *Sudlow*, had had sufficient notice of the determination of the Commissioners to reject the claim, and that it was their duty therefore to come forward, and by evidence remove such objections and substantiate the debt, if any existed. That at this meeting a dividend of 7*s.* 9*d.* in the pound was declared, and ordered to be paid to the several creditors who had proved their debts under the said commission, to the exclusion of

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the said petitioners; the result of which meeting deponent communicated by the post on the next day. That on the 7th January last the agents for the petitioners served upon Messrs. *Amory* & *Coles*, as solicitors for the assignees of *Isaac Marsh*, a notice, not to pay any of the creditors the dividend of 7*s.* 9*d.* in the pound, and of their intention to present this petition.

Mr. *Wilbraham*, for the petitioners.

Mr. *Montagu*, for the respondents, contended, that the petitioners were bound by the laches they had been guilty of, and it was now too late for them to claim a right to stay the dividend that had been declared.

ERSKINE, C. J.—Admitting the fact, that there has been great negligence on the part of the petitioners, and that if this application had been made by a mere individual creditor, the Court would not have been disposed to listen to the prayer of this petition; yet, as the parties come here as assignees, for the benefit of a large body of creditors, I think we are bound to entertain the application. It appears, that no dividends are yet paid, and little injury can be sustained by the short delay, that will be occasioned by an examination of the claim of the petitioners. Therefore, I think the prayer of this petition ought to be granted, the petitioners paying the costs of this petition, and of the meeting to open the dividend; but giving liberty to the assignees under *Isaac Marsh*'s commission to pay the dividend already declared, if they shall think fit, leaving sufficient to answer the petitioners' debt.

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Ex parte SMITH and another.

Sir A. PELL concurred.

Sir J. CROSS.—I am of the same opinion; and I moreover think that less negligence is attributable to the petitioners, than is imputed to them. For the letter of the 24th September clearly warns them not to come to the audit meeting; inasmuch as "no debts can be then proved." I think, also, that the Commissioners, who were aware that the claim of the petitioners was then pending, did wrong in not thoroughly investigating it at the dividend meeting of creditors on the 3d January.

Sir G. ROSE concurred.

It was, therefore, ordered according to the prayer of the petition.

Southampton Buildings, February 28.

Where an assignee is removed for the benefit of the estate, he is entitled to be reimbursed out of any fund in hand, before it is transferred to the new assignee.

Ex parte JAMES.—In the matter of DAVIS.

THIS was a petition for a new choice of assignees, in the room of those formerly chosen; one of whom was not to be found, another had become bankrupt, and the third had become insane.

Mr. *Montagu*, for the petition.

Mr. *Jacob* appeared for the insane assignee, who had had the sole management of the estate; and stated, that there was a fund of 13*l.* belonging to the estate in the bankers' hands, in the name of the assignees. The solicitor to the commission had a claim, for his bill of costs, of about 10*l.* against the assignees, for which the assignee

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Ex parte JAMES.

who appeared was of course jointly liable with the rest; and the assignee was also entitled to his costs of this application, when taxed. He therefore submitted, that this assignee had a right to retain the amount of the solicitor's demand, out of any fund there might be in hand, and also sufficient to pay the costs of the present application.

Mr. *Montagu* contended, that the 13*l.* ought to be paid over to the new assignees, and divided among the general creditors, leaving Mr. *Jacob*'s client to come in *pari passu* with the other creditors: but

THE COURT thought, that on the general principle of reimbursing an assignee, who was to be removed for the benefit of the estate, the insane assignee ought to have the right of retention now claimed for him by his counsel. It was therefore ordered, that a new choice of assignees should take place, and that the amount of the solicitor's bill should be paid, together with the taxed costs of this application, out of the 13*l.*, if the same would so far extend, and that the residue, if any, should be paid over to the new assignees (*a*).

(*a*) The distinction appears to be, that where the assignee is removed for the convenience of the estate, as in case of bodily infirmity, he is entitled to the costs of the application for his removal; but where he applies to be removed, merely for his own convenience, he then is liable to pay the costs himself. *Re Roberts*, Buck, 465; 3 Mad. 273; *Anon.* 5 Mad. 76; 1 Deac. B. L. 345.

1832.

February 29.

Where an equitable mortgagee, with a power of sale, had executed the power by putting up the estate to sale, when it was sold to him for 300*l.*, and he applied afterwards for the usual order:—Held, that the estate must be put up at that sum.

Ex parte FRANCIS.—In the matter of BROWN.

MR. *Montagu* applied, on behalf of an equitable mortgagee, for the usual order for a sale, and leave to bid.

Mr. *Spence*, on the part of the assignees, contended, that in this case there had been a power of sale given to the mortgagee, which had been executed by him, and the estate sold to him at 300*l.* If, therefore, the prayer of the petition were granted, it could only be by putting up the estate at the sum of 300*l.*

THE COURT accordingly ordered a sale, with leave to bid; the estate to be put up at 300*l.* The question of costs to stand over, to see what amount the estate might realize, and whether there would be any surplus above the 300*l.* sufficient to pay the costs.

Same day.

A solvent partner is entitled to retain the partnership books, when the other becomes bankrupt.

Ex parte FINCH.—In the matter of COVERDALE.

A Question arose out of this petition, whether, where one of two partners had become bankrupt, and the other remained solvent, the Court could order the solvent partner to deliver up the partnership books for the purposes of the bankruptcy.

THE COURT decided, that it had no power to take books out of the hands of the solvent partner, and therefore that he was at perfect liberty to retain them.

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Ex parte JOHN ROBINSON.—In the matter of JOSEPH RASTALL.

February 29.

A promissory note payable to "*A. B.* or order, on demand," is not a note payable to *the bearer on demand*, and is consequently within the second class of notes in the first Schedule of the Stamp Act, which are chargeable with the lower duty.

THIS was a petition of a creditor, praying, that he might be at liberty to prove his debt of 70*l.* against the estate of the bankrupt, and that the assignees might be ordered forthwith to call a meeting for that purpose, and be thereupon ordered to pay to the petitioner his dividend of 6*s.* in the pound, rateably with the other creditors of the bankrupt; and that the assignees might be in the mean time restrained from paying such dividend among the other creditors; and that the costs of such meeting, and of this petition, might be paid out of the estate.

The commission issued on the 30th December 1829, when the bankrupt was indebted to the petitioner in the sum of 70*l.*, with an arrear of interest thereon, upon a joint and several promissory note under the hands of the bankrupt and two other persons, which was in the following form:—

"1825, January 17th, Newark.

"We jointly and severally promise to pay to Mr. *Robinson*, of Newark, Notts, *or order*, the sum of 70*l.*, with lawful interest for the same, *on demand (or his order)*, for value received."

Signed, "*Joseph Rastall, Thomas Carman, William Carman*, junior."

This note was upon a 3*s.* 6*d.* stamp.

At a meeting of the Commissioners, held on 27th December 1831, for the purpose of proving debts and declaring a dividend, the petitioners attended to prove the note, when an objection was taken that the note was on an insufficient stamp; for that, being payable

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on demand, it required a stamp of 8*s.* 6*d.*; and the Commissioners decided in favour of the objection. A dividend of 6*s.* in the pound was declared at this meeting.

Mr. *G. Richards*, in support of the petition, after referring to the 24th section of the Stamp Act of 55 *Geo.* 3. c. 184., contended, that this note came within the second class in the first schedule of that Act, relating to promissory notes. He admitted, that if the note had been payable to *J. R.*, or bearer, or to *J. R.* on demand, only, then the 8*s.* 6*d.* stamp would have been requisite. The first class in the schedule, which were liable to an 8*s.* 6*d.* stamp, came under the denomination of promissory notes payable to the bearer on demand; and at the end of that class are the directions, that such "notes may be re-issued after payment thereof, as often as shall be thought fit." Now this note is not, in its form, payable to the bearer, nor was it intended to be re-issuable; therefore it is not within the first class, and must consequently fall within the second class provided for, namely, notes payable "in any other manner than to the bearer on demand, but not exceeding two months after date, or 60 days' sight."

Mr. *Wilson*, on the part of the assignees, relied on the case of *Keates* v. *Whieldon* (*a*), where it was held, that a promissory note for 11*l.*, payable to *A. B.* on demand, was payable to the bearer on demand, and therefore required a 2*s.* stamp. [*Sir J. Cross.* Can you say, that a note payable to *A. B.* is a note re-issuable?] The question does not depend upon whe-

(*a*) 8 B. & C. 7.

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ther the note is re-issuable, or not. This was decided by the case of *Whitlock* v. *Underwood* (*a*). So also in the case of *East* v. —— (*b*) it was held, that a promissory note for 11*l.* 10*s.*, made payable "on demand to bearer, with interest, for value received," required a 2*s.* stamp. The note, in this case, is payable to bearer; for the payee, by his indorsement, makes it payable to the bearer. [*Erskine*, C. J. Perhaps a special indorsement might have that effect, but I do not think a simple indorsement has.]

Mr. *Richards*, in reply. The two cases, of *Keates* v. *Whieldon*, and *Whitlock* v. *Underwood*, completely misled the Commissioners when this question was before them. Those cases cannot apply to this, unless it is to be taken that the words "*bearer*" and "*order*" are synonymous terms. The question is, whether a note payable to *J. R.*, *or order*, passes by delivery, or by indorsement. A direction to pay it to *J. R.*, *or bearer*, would, of course, make it transferable by mere *delivery*; but a direction to pay a note to *J. R.*, *or order*, requires an *indorsement*, as well as a delivery, to render it assignable (*c*). The case of *Whitlock* v. *Underwood* differed materially from this, inasmuch as the note was there payable to *bearer*. Here, however, it is payable to *order*. It is, therefore, a promissory note for the payment of money, "*in other manner than to the bearer on demand*," and requires only a 3*s.* 6*d.* stamp.

ERSKINE, C. J.—The objection made to the validity of this promissory note arises on the first schedule of the Stamp Act of 55 *Geo.* 3. c. 184., by which the duties

(*a*) 2 B. & C. 157. (*b*) 2 Man. & Ryl. 8. (*c*) Bayley on Bills, 27, 30.

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on promissory notes are regulated; and the question is, whether this promissory note falls within the first class of promissory notes there mentioned. Now, what is the title of that class? "Promissory note, for the payment, to the bearer, on demand, of any sum of money." Is this note then payable to the bearer on demand? I admit, that if in law this can be construed to be payable to the bearer on demand, although it is not so expressed to be on the face of it, the higher class of stamp duty would attach. In *Whitlock* v. *Underwood* (*a*), the note was payable to *A. B., or bearer;* it was, therefore, held to be payable to the bearer on demand, and consequently to come within the first class of the schedule of the Stamp Act. In the case of *East* v. ——, it was payable to *bearer on demand,* and therefore clearly within the first class. In the present case, however, it is payable to Mr. *Robinson, or order,* on demand; and the question is, whether the expression "*or order*" has the same meaning, and is in its nature similar to "*bearer.*" I apprehend, there is no case in which it has been so decided. The case of *Keates* v. *Whieldon* (*b*), in which the note was payable to *A. B. on demand,* does not seem to me to touch this point. The question here is, whether this note, in the way in which it is framed, is transferable by mere delivery,—or by delivery, accompanied with the order of the payee. If by the former, no indorsement can at any time confine its mode of transfer. It will, therefore, remain as originally constituted, that is, passable and payable by mere delivery. If it is transferable by the *order* of the payee, it can pass by *indorsement* only. And if at any time it be specially indorsed, then a second indorsement becomes neces-

(*a*) 2 B. & C. 157. (*b*) 8 B. & C. 7.

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Ex parte Robinson.

sary, to pass it to a subsequent holder. This note is payable to Mr. *Robinson*, or order, and therefore cannot pass without his indorsement. From the title of the first class of notes in the schedule of the Stamp Act, and the memorandum at the end, it is evident, that the statute meant to attach the higher duty on notes passable by delivery only. I am therefore of opinion, that this note falls within the second class of notes mentioned in the schedule, and is written on a proper stamp: consequently, I think the Commissioners were wrong in refusing to admit the proof, and that the petitioner ought to be allowed to prove it.

Sir A. Pell.—I perfectly coincide in the opinion of his Honor the Chief Judge. But, as the case of *Keates* v. *Whieldon* (*a*) has been cited, and is supposed to be decided on such high authority, I wish to say a few words on it. As the case is reported in *Barnewall* and *Cresswell*, it appears to be held, that a note payable to *A. B. on demand* is a note payable to *bearer*. The judgment of Lord *Tenterden*, as there given, is certainly in very broad terms; and I must confess, that I can hardly conceive such to have been his judgment. It seems to me a most extraordinary proposition, to say, that an order to pay to *A. B. only*, is equivalent to an order to pay to *any person*. I have always understood, that a note payable to *A.* alone is not negotiable, and can be paid to no other party than to *A.* himself. If I direct a note to my bankers payable to *A. B.*, and it comes to the hands of *C. D.*, I think the bankers would be liable for the payment of it to *C. D.* The case of *Keates* v. *Whicldon* must be either wrongly reported,

(*a*) 8 B. & C. 7.

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or the facts insufficiently stated: for the facts which are there stated do certainly not warrant so broad a position. From Mr. Justice *Bayley*'s judgment, I should draw the conclusion, that his decision did not go to that extent. With reference to the present case, we have only to inquire, is the note in question payable "in any other manner than to the bearer on demand"? Is it payable to Mr. *Robinson* on demand,—not on a demand made by any "*bearer*," in the ordinary acceptation of that word, but on a demand made by his *order?* I apprehend both these questions must be answered in the affirmative. If *Robinson* had indorsed it specially, it would only be payable to that person, and could only pass afterwards by a second indorsement. It clearly seems to me to be a note not payable to the bearer on demand, but only to a specified person, or his indorsee,—and to fall, therefore, within the second class of the schedule of the Stamp Act. I do not think, however, that the case of *Keates* v. *Whieldon* (*a*) has so strong a bearing upon this case, as to say that our judgment will overrule it.

(*a*) The case of *Keates* v. *Whieldon* has, however, been overruled by *Armitage* v. *Berry*, 5 Bing. 501, and *Moyser* v. *Whitaker*, 9 B. & C. 409; neither of which cases was cited in the above argument. So that the Court of Review, without any aid of authority, has in this instance exercised its own unbiassed judgment, in refusing to be guided by a position untenable in law, even though sanctioned by a solemn decision of the Court of King's Bench. How such a decision could ever have been pronounced by that Court —as that a promissory note payable to *A. B.*, *on demand*, is payable to the *bearer on demand*—certainly affords some matter for wonder. For one of the first principles recognized in the law of bills of exchange and promissory notes is, that a bill or note payable to *A. B.*, without any words to render it transferable, is merely a personal obligation to *A. B.*, and cannot be assigned or negociated by him. *Hill* v. *Lewis*, 1 Salk. 132; *Archer* v. *Bank of England*, Doug. 615, 637. And see Bayley on Bills, ch. ii.

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Sir J. CROSS.—I think this is not a note payable to the bearer on demand; if it were, it would pass without indorsement. But it is payable to the payee, or his order; and without his indorsement it is not negotiable, and therefore it falls within the second class of notes mentioned in the schedule of the Stamp Act.

Sir G. ROSE.—I entirely concur; and upon the principle, that this note can only pass by indorsement.

The prayer of the petitioner was therefore granted; the costs to come out of the estate.

ANONYMOUS.

February 29.

Informal address of petition.

A Petition, which was addressed thus:—"To the Right Honourable the Chief Judge, and the other Judges," without adding "of the Court of Review," was held to be informal, and ordered to be amended.

Ex parte ROBERT COTESWORTH, EDWARD BUXTON, and JOSHUA HART.—In the matter of JOSEPH VANZELLER.

Southampton Buildings, March 1.

This Court will not expunge a proof, merely because the creditor has instituted process in a foreign country for the recovery of his debt, in the absence of all evidence as to the nature of the process abroad.

THE petitioners in this case were the assignees of the above bankrupt, and prayed that the proof of a debt against the bankrupt's estate, of 4490*l.*, made by *Chevalier Eustaquio Adolpho de Mello Mattos*, Chargé d'Affaires of the Brazilian government, might be expunged. The facts, as they appeared upon the petition, and in the affidavits in support of it, were these:—The bankrupt,

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before the commission, which issued on the 29th July 1831, carried on business in London as a merchant, on his own account, and also at Bahia, in the Brazils, in partnership with other individuals under the firm of *Vanzeller* and Co. Some time in the year 1830, the Board of finance of *Brazil* wanting to remit money to *England* on account of the Government, made an arrangement with the house of *Vanzeller* and Co. at *Bahia*, for the purpose, and in consequence received bills to the amount of 10,000*l.* from that firm, drawn upon *J. Vanzeller*, in *London*, payable to the order of the Board of finance. Three of the bills, to the amount of 4,300*l.*, were indorsed by the Board and remitted to *Chevalier Mattos*, which were by him presented on the 6th July 1830 to *J. Vanzeller*, and were by him accepted accordingly The rest of the bills were indorsed and remitted in the same way, but after the bankruptcy of *Vanzeller*, and were consequently returned to the Board dishonored. The Government further purchased bills of another merchant of Bahia, named *Lima*, to the amount of 26,300*l.*, which had been drawn in his favour by *Vanzeller* and Co. on *Vanzeller* of London. These were also dishonored. On the 6th November 1830 the house of *Vanzeller* and Co. at Bahia stopped payment, and the partners surrendered themselves as bankrupts according to the Brazilian laws; and in the same month, pursuant to a decree of the proper tribunals there, the whole of their goods were sequestrated on account of the debt of 40,000*l.* due to the Government. This sequestration was to cover both the amount of the bills drawn directly in favour of the Government by *Vanzeller* and Co., and those drawn by the same parties in favour of *Lima*,

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and sold by him to the Government. On his bankruptcy taking place, *Vanzeller* went to the Brazils, and petitioned the proper tribunals to have the sequestration removed from his partnership property at Bahia. Whilst that petition was pending, the Brazilian Government obtained, by process against *Lima*, 26,300*l.*, upon which a decree was issued, reducing the sequestration to 12,716*l.* An official notification of this fact was published in the Brazilian Gazette, February 18th 1831. On the 6th December 1831 the *Chevalier de Mattos* attended before the Commissioners under *Vanzeller*'s bankruptcy, and no objection being made, was allowed by the assignees to prove for the 4,490*l.* due for principal and interest on the three bills of exchange accepted by the bankrupt, as indorsee of them, swearing that he had no other security for the debt, and no other satisfaction for it than the bills.

Mr. *Montagu* and Mr. *Sharpe*, for the petitioners, contended that, under these circumstances, the proof ought to be expunged. The goods of *Vanzeller* and Co., seized by the Brazilian Government, were sufficient to cover its whole claim, including these three bills; and at the date of the last information from Brazil, the 30th November 1831, the Government was still in possession of the goods, and were about to sell them to satisfy its claims. At any rate, these goods were some kind of security for the debt, and the *Chevalier de Mattos* would never have been allowed by the Commissioners to prove, had they been made aware of all the circumstances. As it was evident, upon the face of the bills, that *Vanzeller* and Co. of Bahia were the parties with whom *Vanzeller* of London

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was in partnership,—that they were in fact, bills drawn by one member of a firm upon another,—the Chargé d'Affaires could not say, that he was entitled to double proof. He must then, at least, elect, whether he will abide by the security he has obtained in possession of the goods belonging to the joint estate at Bahia, or prove under the commission against the separate estate in this country. [Sir *G. Rose.*—That question does not at present arise upon the petition. The simple question before us is, whether the goods seized are enough to satisfy the debt?] We say that they are.

Mr. *Wigram*, for the respondent *Chevalier de Mattos.*—All that we want is, to stay the dividend till the amount produced by the goods is ascertained.

Sir A. PELL.—Do you not think, that the justice of the case would be met, by staying the dividend till inquiry has been made in the Brazils, as to whether the debt of the Government has been satisfied?

Mr. *Montagu* said, that he would not object to this course, provided the debt were turned into a simple claim; for, otherwise, the bankrupt would remain uncertificated for a twelvemonth.

Mr. *Wigram* observed, that there might be a difficulty in reproving the debt, and therefore he could not consent to turn the present proof into a claim. [Sir *G. Rose.*—The Court, knowing what it did, would never have placed it on the proceedings as a debt; but since it is there, we will not disturb it.] The solicitors

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of the bankrupt have been applied to, for the purpose of knowing whether they had any objection to the proof; and it was with their consent that the proof was made. This was after *Vanzeller* had returned from the Brazils, and must have acquainted his solicitors and assignees with his proceedings there.

Mr. *Montagu* in reply, said, that if the proof were turned into a claim, the respondent, the *Chevalier de Mattos*, would, if it should turn out to be just, be no loser, and the bankrupt would obtain his certificate; but if it were not turned into a claim, he must go uncertificated for a whole year. He, therefore, persevered in his argument for expunging the proof altogether, which he contended could not stand. Besides, there was this radical objection to it. The statute required, that the proof of a creditor's debt, where the creditor was out of England, should be by affidavit certified by a magistrate of the country where he resided, a notary public, or the English minister. *M. de Mattos* did not pretend that he was such a creditor, or that he had given any value for the bill; the debt, too, had been proved by no such affidavit; which could not be dispensed with, except by consent. But that consent was not to prejudice persons not a party to it; and the bankrupt, who would now be prejudiced, was no party to the consent given by the assignees. The assignees themselves, however, were desirous of waiving that objection; and it was now only pressed on the consideration of the Court, for the benefit of the bankrupt, who must otherwise remain uncertificated for so long a time.

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ERSKINE, C. J.—I do not think there is any authority to show that a debt has been expunged after proof, upon an objection of this nature not taken before the Commissioners. And I think the assignees, at least, are bound by such proof. Moreover, this question is not raised upon the petition, and we cannot enter into the collateral question of what might be the effect of an order made upon this petition, in regard to the bankrupt's certificate. The bankrupt, if he thinks himself aggrieved, may himself come before the Court in another mode. In the present case, however, all seems to turn on the nature of the process in the Brazils. Is it, or is it not, a satisfaction, or security? If it is in the nature of an execution in this country, undoubtedly the same rules must apply to it. But how are we to know that fact, in the absence of all evidence respecting it? At present, we do not know if that process takes the property out of the power or ownership of *Vanzeller* & Co. We cannot, sitting here, take judicial notice of foreign laws. Looking, therefore, to the question between the assignees and the respondent *Chevalier de Mattos*, the justice of the case seems to require that we should not grant the prayer of this petition.

Sir A. PELL.—I feel it to be impossible to come to any determination on this petition, in the absence of information as to the nature of the security in the Brazils. Here the *Chevalier de Mattos* swears, that he has no security for his debt; and we cannot presume it to be otherwise, upon the mere belief of the other side, as expressed in their affidavits.

Sir J. CROSS.—It seems to me to be agreed on all hands, that the payment of the dividend ought to be

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staid, till inquiry be made as to the nature of the process abroad, and the extent of the satisfaction, if any, which it affords to the party issuing it. On the part of the petitioners, it is contended, that the proof ought to be expunged, and turned into a claim. I am of opinion, that there is not sufficient evidence for this. It is not sufficient, merely, because an undefined, and in its nature an unknown, process has been resorted to abroad, to say, that it amounts to a satisfaction. Suppose this process should turn out to be an execution, without a right or power to sell, has not the creditor a right to prove his debt, and swear he has no security? I apprehend he clearly has; and, in the present state of the case, it would be an injustice to expunge the proof, by turning it into a claim, where, on re-proving, a difficulty might be raised, which could not be easily got over by the respondent.

Sir G. ROSE fully concurred in the judgment already pronounced. As between the assignee and the creditor, by the waiver on the part of the former, the objection as to the proof by an agent has fallen to the ground. The creditor has been admitted to prove; and therefore the proof cannot, in the present stage of the case, be expunged, merely with a view to the allowance of the certificate; although, if a claim only had been allowed, this would not have interfered with the obtaining of the certificate.

The proof was thereupon ordered to stand, and the payment of the dividends to be stayed for six months, and until further order, with liberty to apply to the Court in the meantime. The question of the costs to be reserved.

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Where a creditor petitions to prove a debt which is not in its nature provable, the petition will be dismissed with costs, notwithstanding the Commissioners rejected the proof for an insufficient reason.

Ex parte WORTHINGTON.—In the matter of ISAAC MARSH.

ON the 24th March 1829 the bankrupt, together with *James Marsh*, executed a joint warrant of attorney to the petitioner, for securing to him the sum of 100*l.* lent by him to *James Marsh*, with interest thereon after the rate of 5*l.* per cent. per annum; which warrant of attorney was duly registered, but no judgment had ever been entered up on it. On the 11th June last a commission was issued against *Isaac Marsh*, under which he was duly found and declared a bankrupt; and the petitioner applied to prove his debt under the warrant of attorney; but the proof was rejected by the Commissioners, on the ground of the security being joint only, and not joint and several, and that the original consideration was credit given to *James Marsh;* by which the petitioner was not only deprived of any dividend under the commission, but also of the opportunity of assenting to or dissenting from the bankrupt's certificate. It appeared, that *James Marsh* and *Isaac Marsh* were not in any way jointly interested in trade, nor had they any joint establishment of any kind, or any effects of any description in which they were jointly interested, either directly or indirectly; so that if the decision of the Commissioners was correct, the petitioner could in no way be benefited by *Isaac Marsh* joining in the warrant of attorney. The petitioner therefore prayed that the Court would order the Commissioners to admit the proof of the debt, for the purpose of receiving a dividend thereon rateably with the other creditors; and that such proof might be allowed, so as to give him

a right to assent to or dissent from the bankrupt's certificate.

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Mr. *Wilbraham*, for the petitioner, admitted that he could not contend for the admissibility of the proof of the sum secured by this warrant of attorney, as no judgment had been entered up on it before the act of bankruptcy, and it could not therefore be treated as a debt against the bankrupt, who was only a surety. But inasmuch as the Commissioners had rejected the proof, not on this ground, but because there was no joint estate, which was, in reality, no good cause of rejection,—as a joint creditor may clearly prove against the separate estate, where there is no joint estate,—the petition, it was hoped, would not be dismissed with costs. For, if the Commissioners had given a proper reason for rejecting the proof, it is probable that this petition would not have been presented. But

The COURT thought, that as the assignees were improperly brought here to resist the proof of a debt, which was not in itself provable, there was no reason why the petition should not be dismissed with costs.

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Coram Lord Chancellor, Lincoln's Inn, March 7.

Upon an application for an order to examine the parties to a petition as witnesses on the trial of an issue, the L. C. declined to make such order.

In the matter of CHRISTIE.

THIS was a petition to the Lord Chancellor for certain issues to be directed to try the validity of the commission, which it was alleged had been issued for the purpose of putting an end to a partnership subsisting between the bankrupt and a Mr. *Saunders*, and, as it was stated also, on a bad petitioning creditor's debt. The petition further prayed, that his Lordship would order the parties to be examined as witnesses on the trial.

Mr. *Montagu*, for the petitioner, stated, that a reference had been originally agreed on between the parties, but it was afterwards found that it would be more expedient to try the questions between them at law. The petitioning creditor's debt was disputed; and it was also insisted that the commission had been issued for an improper object, namely, for the mere purpose of determining a partnership. The present application therefore was, that issues might be directed to try these facts, and for an order that the parties might be examined.

Mr. *Jacob*, for the petitioning creditor, opposed the application, and contended that the petition ought to be dismissed.

Lord BROUGHAM, L. C.—I think I must grant the last issue prayed for, and therefore I am disposed to have the other tried at the same time and in the same manner. It is, however, impossible for me to accede to that part of the application which suggests the exa-

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mination of the parties. Such a practice would be opposed to the principles by which courts of law are regulated, and might lead to a conflict of statements which can be of no use, and which ought to be avoided. If the affidavits had contained sufficient to enable me to decide the case, I should not have granted the issues, but they fall far short of that.

The terms of the issues were then agreed to by the counsel for the several parties.

Ex parte THOMAS TINDAL.—In the matter of JOSEPH GIBBINS, WILLIAM WYNNE SMITH, and WILLIAM GOODE, Bankrupts (*a*).

Coram Lord Chancellor, Lord C. J. Tindal, and Littledale, J. Lincoln's Inn, August 1831.

A bankrupt covenanted by his marriage settlement, that his heirs, executors, &c. should, within twelve calendar months after his decease, pay 4000*l.* to trustees, upon trust to pay the interest to his intended wife for her life; and after her death then to pay the principal sum to the children of the marriage; and if no children, to the wife, if she survived her husband; but if not, then to the executors of the husband:—Held, that this covenant constituted a *debt* contracted by the bankrupt, payable on a *contingency*, and capable of *valuation*; and therefore provable within the 56th section of the 6 *Geo.* 4. c. 16.

THIS was a petition praying for a rehearing, and for the reversal of a judgment of Lord Chancellor *Lyndhurst*, dated 31st July 1830. The petitioner was the surviving trustee under the marriage settlement of the bankrupt *William Wynne Smith* and *Elizabeth* his wife, and claiming as a creditor of the said *William Wynne Smith*. The petition stated the following facts:—

In November 1828 the petitioner and *Richard Bird* deceased, the other trustee under the above marriage settlement, presented a petition to the then Lord Chancellor, Lord *Lyndhurst*, stating, that by the settlement

(*a*) This case was argued before Lord Chancellor *Brougham*, Lord C. J. *Tindal*, and Mr. Justice *Littledale*, in August 1831, but judgment was not pronounced in it till the 2d May 1832.

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dated 1st August 1815, which was made on the marriage of the bankrupt *Smith* and his wife, *Smith*, in consideration of the marriage and of 1300*l.* paid to him by the wife, then *Elizabeth Gray*,—and also in consideration of the further sum of 1000*l.* paid him by *E. O. Gray*, the father of *Elizabeth Gray*,—covenanted with the petitioner and *R. Bird*, as trustees, to pay an annual sum of 80*l.* to them during the joint lives of *Smith* and his wife, for her sole and separate use. And *E. O. Gray* covenanted with the petitioner and *R. Bird*, that in case of the intended marriage taking effect, his heirs, executors, or administrators should, on or before the expiration of twelve months next after his decease, pay unto the trustees the sum of 4000*l.*; and in consideration thereof *Smith* covenanted that his heirs, executors, or administrators should, within twelve calendar months after his decease, pay to the trustees 4000*l.* And it was declared, that the trustees should stand possessed of both sums of 4000*l.*, upon trust, during the life of *Smith*, to pay the interest to him and his assigns; and, after his death, to the intended wife, for her own use and benefit; and, after the decease of the survivor, then to pay the trust monies unto the children of the marriage, in such shares and proportions, and in such manner, as the intended husband and wife should, during their joint lives, by deed appoint. And in default of such joint appointment, then as the survivor should by deed or will direct. And in default of any appointment by the survivor, then in trust for all the children of the intended marriage, who, being sons, should attain the age of twenty-one years, or who, being daughters, should attain that age or marry, to be divided in equal shares; and in case there should be but

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one such child, then the whole to that child, with provisions for maintenance, &c. of the children during their minority; and in the event of failure of issue of the marriage, then upon trust to transfer the trust monies to the survivor of the intended husband and wife, his or her executors, administrators, or assigns, for his or their own use and benefit.

The intended marriage was duly solemnized between the bankrupt *Smith* and *Elizabeth Gray*. *E. O. Gray*, the father, died about 19th March 1816, and his executors duly paid to the trustees the sum of 4000*l.* in satisfaction of his covenant. There was no issue of the marriage.

On the 19th December 1825 a joint commission issued against the above bankrupts, as copartners. At a meeting of the Commissioners on the 18th July 1828, the trustees applied to prove for the value of the 4000*l.* covenanted to be paid by *Smith*, such value to be ascertained by the Commissioners according to the statute (*a*). But the Commissioners declined to receive the same, and recommended a petition to be presented to the Lord Chancellor, praying for an order that such proof might be admitted, and for costs out of the separate estate of *Smith*.

A petition to that effect was presented accordingly, and was heard on the 4th August 1829 before his Honor the Vice-Chancellor (*b*), who ordered, that it should be referred to the Commissioners to ascertain and set a value upon the said sum of 4000*l.* so covenanted to be paid after the decease of the bankrupt *Smith*; and, for the better ascertaining such value, that all necessary and proper parties should be severally

(*a*) 6 G. 4. c. 16. s. 56.

(*b*) See Mont. & M. 415.

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examined before the Commissioners, as the Commissioners should think fit, and severally produce on oath all books and documents relating to the said trust money; and that the trustees should be at liberty to go in under the commission, and prove against the separate estate of *Smith* such value when so ascertained.

On the 14th November 1829 a petition of appeal was presented to Lord Chancellor *Lyndhurst* by the assignees of the above bankrupts, praying a rehearing, and the reversal of such order of the Vice-Chancellor; which appeal was heard on the 31st July 1830 by Lord *Lyndhurst* (*a*), who was pleased to discharge the Vice-Chancellor's order, and dismiss the original petition. *Richard Bird*, one of the trustees, died about the 23d January 1831, leaving the other trustee, *T. Tindal*, surviving him.

The present petitioner therefore prayed, that the original petition might be reheard, that the order of the 31st July 1830 might be rescinded, and that the Vice-Chancellor's order of the 4th of August 1829 might be affirmed.

Mr. *Montagu* and Mr. *Parker* for the petitioner.—The objections taken by the respondents on the former hearings were—1st. That this is not a debt contracted within the meaning of the 56th section of the 6th *Geo.* 4. c. 16 (*b*). 2dly. That if it be a debt so contracted, it is on a contingency too remote to allow of calculating the value according to the act.

In answer to the first objection, the case of *Ex parte Grundy* (*c*) may be referred to, where it was held that

(*a*) See *Ex parte Eagle*, Mont. & M. 422. (*b*) Mont. & M. 417.
(*c*) Mont. & M. 293.

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a bond and covenant of this description gave a right of proof, although the contingency happened after the issuing of the commission, and before the 6th *Geo.* 4. c. 16. s. 56 came into operation. The words of that section are, " If any bankrupt shall, before the issuing of the commission, have *contracted* any debt payable upon a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the Commissioners to set a value upon such debt, and the Commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed." The meaning of this section of the act of parliament, as explained by the case of *Biré* v. *Moreau* (*a*), is " a *contract* on a contingency," and was held not to apply to costs, upon a judgment obtained after bankruptcy; that being a debt arising not on contract, but *in invitum*. And the cases of *Atwood* v. *Partridge* (*b*) and *Faber* v. *Young* (*c*) are to the same effect.

All the cases to be met with before the 6th *Geo.* 4. c. 16, against the admission of such a proof, clearly evince the impression entertained by the several judges

(*a*) 4 Bing. 57.
(*b*) 4 Bing. 209.
(*c*) 3 B. & A. 529.

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who decided them (*a*), of the extreme hardship of the position in which a party entitled to a contingent debt, as well as the honest bankrupt himself, were placed in; for in all these cases the judges, more or less, express their anxiety to see the law in this respect altered by legislative enactment.

It was for the purpose of remedying an evil so universally admitted, that the provision made by the 56th section was introduced, for the first time, into the 6th *Geo.* 4. c. 16. That act is remedial; and it is the duty of the Court to extend the construction of it, so as to take in the present case. In the *Dean of York* v. *Middleburgh* (*b*) Lord Chief Baron Alexander says, "It is by no means unusual, in construing a statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief, where the statute is remedial." The statute also, by the 51st section, provides for debts subsisting at the bankruptcy, but not payable till a future period, —such as those on bills, bonds, notes, or other securities, which are proveable under the commission, but with a rebate of interest. The 52d section provides for sureties who may become liable; the 53d for bottomry and respondentia bonds; the 54th and 55th apply to annuitants; and the 56th to contingent debts. If, therefore, creditors under marriage settlements were excluded from this section, the section would be wholly inoperative and useless; unless it should be construed

(*a*) *Ex parte Greenway*, 1 Atk. 113; *Ex parte Groome*, id. 115; *Ex parte Barker*, 9 Ves. 110; *Mayer* v. *Steward*, 4 Bur. 2439, cited 8 East, 516; *Wyllie* v. *Wilkes*, Doug. 519; *Cowley* v. *Dunlop*, 7 T. R. 565; *Bamford* v. *Burrell*, 2 B. & P. 1.

(*b*) 2 Y. & J. 215.

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to be confined to the case of guarantees,—which, however, would be contrary to the known rule of law, that words used in a general sense are not unnecessarily to be limited to a particular case.

As to the *second* objection, namely, the impossibility of valuation, from the remoteness of the contingency,—there is no such difficulty in this case. The valuation to be made is simply on the contingency of the husband dying before the wife, with or without children. But the mere difficulty of the calculation, supposing such a difficulty to exist, ought not to deter the Court from the admission of the proof. The only question, however,—and one which may be solved by any actuary,—is this: What is the value of the interest of a wife, of the age of 42, in certain funds, to which she will be entitled if she survives her husband, who is of the age of 50?

Mr. *Pepys* and Mr. *Rolfe* for the assignees. As to the *first* objection, the debt in this case is one, by the terms of the settlement, payable after the death of the bankrupt, and not before. It is a debt, therefore, which the bankrupt cannot himself be personally called upon to pay, and, consequently, neither can his assignees. It may affect his assets after his decease, but the scope of the bankrupt laws cannot be extended to the administration of an estate, that may only be acquired by the bankrupt after obtaining his certificate. The present claim is a mere covenant to pay, and like a covenant to leave a sum of money by will, as in the case of *Lee* v. *D'Aranda* (*a*). The covenant could not have been satisfied by mere payment in the life-time of

(*a*) 1 Ves. sen. 1; 3 Atk. 419.

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the covenantor to the trustee, without a release also obtained from the *cestui que trust.* Nor could the heir or executor of the covenantor have pleaded *solvit ad diem.* [*Tindal,* C. J. He might have pleaded accord and satisfaction.] That, however, would not have been good in equity, unless he had also shown *accord* with the *cestui que trust,* which is here an impossibility. But where there is a mere covenant to leave a sum by will, it does not create a debt either from the covenantor himself, or from his executors. *Perrot* v. *Austin* (*a*). [*Littledale,* J. referred to the case of *Plumer* v. *Marchant* (*b*).] In that case, which was an action by a specialty creditor against an administrator, the intestate had bound himself to the defendant in a penalty, thereby creating a clear legal debt. And, as was observed in the argument of that case, the administrator might have immediately paid the amount to the trustee as soon as the intestate was dead, had not the administrator himself stood in the situation of a trustee as well as administrator; but, in his character of administrator, he had a right to retain it.

As to the *second* objection, we contend that there is no possibility of calculating the interest of the petitioner in this sum of 4000*l.* At the present moment there is no issue of the marriage. If this should continue to be the case, and the bankrupt survive the wife, then there can be no proof; because the bankrupt will be proving for his own benefit, contrary to the rule laid down in *Ex parte Taaffe* (*c*). It is therefore a calculation of the probability of issue, which is incapable of being made. Be-

(*a*) Cro. Eliz. 232. (*b*) 3 Bur. 1380.
(*c*) 1 G. & J. 110.

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sides, there is the difficulty as to the form of proof. For the proof must be made by all the adults, and by or on behalf of each of the infants, who may be numerous; and the funds must accumulate, till the number entitled is ascertained by the happening of the contingency.

Mr. *Montagu* in reply. As to the difficulty of proof, the trustee is the proper person to prove, subject to any order the Court may think proper to make for the protection of the *cestui que trust*. *Ex parte Dubois* (*a*). And the number of claimants can raise no difficulty in this case; for in other instances they have been far more numerous.

Cur. adv. ult.

Easter Term, 2d May 1832.

Lord C. J. TINDAL—In this case, which arises upon a proof claimed to be made by trustees under a marriage settlement, it is unnecessary to state the facts, which are completely in the possession of the Court.

It appeared to my brother *Littledale* and myself, that there were two questions in this case: *first*, whether the bankrupt has contracted a debt payable on a contingency, within the meaning of the 6 *Geo.* 4. c. 16. s. 56; and *secondly*, supposing that he has done so, whether the commissioners can set a value upon the debt, so as to make it the subject of proof under the commission.

On the *first* question, it is contended on behalf of the assignees, that the contract entered into by the bankrupt is not a debt, but merely a covenant that the executors of the bankrupt shall pay a sum of money on a collateral event; and that the only effect of that con-

(*a*) 1 Cox, 312.

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tract is to create a charge on his assets; and that such was all that the parties contemplated by the settlement; as the bankrupt himself could never have been liable to pay the money. That the parties themselves took the chance of what the assets might produce,—a chance which in some cases might be more beneficial to the wife and children; because, if the husband should become bankrupt, and afterwards acquire property, they would have the benefit of the provision in full, instead of a dividend very much diminished, as it might be, by the calculation of the contingency. But we are of opinion, that the contract contained in the settlement is a debt which the bankrupt has contracted, within the meaning of the 56th section of the late bankrupt act.

A covenant to pay a sum of money constitutes a debt, and an action of *debt*, technically so called, may be maintained upon it. 1 *Leon.* 208; *Com. Dig.* tit. Debt, A. 4; *Ingledon* v. *Cripps* (*a*). For, though in the case last cited there was a penalty, yet the language of the Court is, that *debt* will lie on a covenant to pay a sum of money; and it is a common practice to draw declarations in *debt*, on a covenant to pay a sum of money. And if a man covenants that his executors shall pay a sum of money after his death, that also appears to us to create a debt; and we think it just as much so, as if he himself had covenanted to pay it. *Plummer* v. *Marchant* (*b*). In that case, the testator covenanted that he would leave by his will, or that his executors or administrators should within six months after his death pay, a sum of money to trustees for the benefit of his wife and children; and an action having been brought

(*a*) 2 Ld. Raym. 814. (*b*) 3 Burr. 1380.

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against the administrator on a bond of the testator, he pleaded *plene administravit*. The question was, whether he could retain the money so covenanted to be paid; and all the Court held, that this was a debt that might be retained. It is true, there was a penalty on which debt would lie; but the Court only noticed that circumstance incidentally; and it is plain, that their judgment would have been the same if there had been no penalty. There may be a doubt, whether an action of *debt*, technically so called, could lie against executors upon such a covenant; because *debt* would not have lain against the testator. *Wentw. Off. Exors. 232*; and *Perrott* v. *Austin* (*a*). Though Lord *Mansfield* speaks very lightly of the latter case of *Perrott* v. *Austin*, and even in the case itself there is a note at the end making a query to one of the reasons. But those authorities are merely as to the form of action,—whether it should be debt or covenant,—and do not affect the substance of the case, which is, whether a sum of money is payable by the contract. And in the case referred to in *Leonard*, it is said, that the word "covenant" sometimes sounds in *covenant*, and sometimes in contract, according to the subject-matter. The case of *Lee* v. *D'Aranda* (*b*) was cited to show, that a covenant that a man's executors should pay, was the same as a covenant to leave a sum of money; and that the latter did not create a debt. But,—without considering whether at law, at least, a covenant that a man's executors shall pay, be for all purposes the same thing as that he will leave a sum of money,—the case of *Lee* v. *D'Aranda*

(*a*) Cro. Eliz. 123. (*b*) 1 Ves. 1; 3 Atk. 419.

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was upon a question, whether a widow should have the benefit of such a covenant, and also of the distributive share, *pro tanto*, of her husband's estate, and was a question on the point of double satisfaction. Many similar cases have occurred, all of which were considered in *Goldsmid* v. *Goldsmid* (*a*). But we do not form our opinion upon the technical ground, that an action of debt will lie in point of form; but upon the substance and effect of an absolute covenant, that a man's executors shall pay a sum of money to certain persons upon certain trusts, which, in our *own opinion*, constitutes a *debt*.

Then, if it be a debt contracted, there is no doubt that it is payable on a *contingency*. There is one contingency, as to the distance of time at which it is payable, depending on the life of the bankrupt; and another, whether the wife or any children be alive at the death of the bankrupt, so as to be entitled to the benefit of it. It is possible, that the contingency, as to who shall have the benefit of it, may never happen at all; which would be the case, if the wife should be dead, and there should be no children at the death of the bankrupt. But it has been urged, that this is not a contingent debt, within the meaning of the act of parliament; because it is uncertain, whether the debt will ever be payable or not. We think, however, that that uncertainty affords no reason why it should not be considered as contingent; and that neither the words, nor the spirit, of the act of parliament require such a restriction upon contingent debts. It surely would put too narrow a construction upon the words of this act, to hold that

(*a*) 1 Swanst. 211.

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they are to be confined to cases, where the event upon which the contingency rests must happen some time or other; and that because such event may never happen, the debt is not to be taken as payable on a contingency; for though the debt *may never be paid*, it is nevertheless payable if the contingency do happen; and as such, it is, strictly and properly speaking, payable on a contingency. One of the classes of contingent remainders is, where the contingency may never happen at all; and it is to be presumed, that the legislature, in using the word *contingency*, meant that it should apply to such cases, as upon other occasions are held to fall within the meaning of that term. Before the late act of parliament, a very extensive set of creditors claiming under marriage articles had, on various occasions, applied to prove debts under commissions of bankruptcy; as appears by the cases of *Tully* v. *Sparkes* (*a*), *Ex parte Coswell* (*b*), *Ex parte Greenaway* (*c*), *Ex parte Groome* and *Ex parte Winchester* (*d*), *Ex parte Mitchell* (*e*), *Ex parte Barker* (*f*), *Ex parte Alcock* (*g*), and of which the last mentioned is *Ex parte Taafe* (*h*) in that class of cases. In many of those cases expressions are used of the hardship of trustees under marriage settlements not being able to prove under a commission of bankruptcy; and there can be but little doubt, that the legislature had in view this numerous class of cases of trustees under marriage settlements; and we think the words of

(*a*) 2 Ld. Raym. R. 1546.
(*b*) 2 P. Wms. 497.
(*c*) 1 Atk. 113.
(*d*) 1 Atk. 115.
(*e*) 1 Atk. 120.
(*f*) 9 Ves. 110.
(*g*) 1 Ves. & Bea. 176.
(*h*) 1 Glyn & J. 110.

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the present act of parliament are sufficient to reach those cases.

But the principal difficulty which has been urged in argument is, that *no valuation* can be made by the commissioners, within the meaning of the act. If the contingency depends upon the lives of persons in existence, and the order of time in which these several individuals may die; such contingencies are clearly reducible to a matter of calculation, and a valuation may be made of the present worth of the debt. But if the valuation depends upon particular events, which may or may not take place,—and upon the lives of persons not now in existence, and where it is uncertain whether any such persons will ever come into existence, —and if any die, it is still uncertain how many there may be,—and the valuation is to be made upon a contingency depending upon such complication of events,—then indeed it may be admitted, that no valuation could be set upon it; as there would be no possibility of bringing such a case within any rules of calculation. And in this particular case, if the valuation must necessarily depend on how many persons there should be, connected with there being any children of this marriage,— or upon the number of such children, if any,—or on the time of the death of those uncertain children,—then we should have thought that no valuation could be made of the debt in question, so as to admit it to proof; but we think the valuation is not to depend upon the fact of there being any future children of the marriage, or upon the time of their death. It appears to us, that such calculation ought to be made merely with reference to the time of the bankrupt's death, and that the valuation is to be simply this,—namely, the present worth of 4000*l.*

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payable twelve months after the death of the bankrupt. The settlement contains a positive covenant, that the debt is to be paid to the trustees at the end of twelve months after the death of the bankrupt. The trustees are therefore entitled to receive the whole at that time, as an absolute debt to themselves. They are directed, after receiving it, to lay out the money on the securities mentioned in the settlement, and to apply the interest and principal in the way therein directed; and in the first instance the wife is to have the whole for her life.

That would be the state of things, if *Smith* had not become bankrupt. Then how is it altered by the bankruptcy? Supposing the debt to the trustees had not been contingent, and had been payable immediately; the trustees would have proved for the whole debt, without reference to the fact, whether there were children or not. Suppose the debt had been payable at a future day certain; then they would have proved the whole debt, deducting a rebate of interest; and that, also, without reference to the fact, whether there were children or not. But this debt being payable at a future day which is uncertain, there can be no rebate of interest, and therefore a value is to be set upon it; and that value, it seems to us, should be governed by the principle, that the value should be put upon the whole debt, without reference to there being children. There being children, or not, ought not to affect the right of the wife to the interest for life, in the first instance; and she cannot have the benefit of the debt, unless the value should be taken in the way we have mentioned. If there are children, the trustees will divide the money amongst them, according to the terms

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of the settlement; and as to those, also, they are entitled to have the benefit of the whole debt, subject to the deduction as to the valuation. If there are no children, the wife will take the debt by survivorship, reduced, as it will be, by the deduction before alluded to, and by the receipt of dividends under the commission, only, instead of the debt itself. In the event of the wife dying before the husband, and there being no children, there will be nobody to take; and then it will revert back to the husband's estate.

One argument adduced against admitting the present proof is, that this may in certain events be a proof for the benefit of the husband, and that therefore it cannot be received. If a proof was made for the immediate benefit of the husband, it would be nugatory to allow it to be made; because the benefit of it must go back to the estate. But if, in the multiplied limitations of a marriage settlement, some benefit may incidentally arise to the husband, there can be no reason why the whole proof should on that account be resisted. Here there are two ways by which the husband might be benefited. One, if the husband should survive the wife, and there should be no children. In that case, the money received on the dividends would go back to the husband's estate; but then the proof would not be considered as having been made for the benefit of the husband; but the whole proof would fall to the ground, and be as if it had never taken place, because the trusts of the settlement, as far as relates to the sum of 4000*l.*, would not come into operation till after the death of the husband. Again, if the wife should die in the lifetime of the husband, and there

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should be children who survived the husband, but they should die before they acquired vested interests,—then, the husband having survived the wife, his executors would be entitled; but that collateral contingent interest to his executors could not be considered, as rendering the proof a proof for the benefit of the husband, so as altogether to exclude it. On the contrary, such beneficial interest vesting in the husband's executors would form part of the estate of the bankrupt.

The case of *Ex parte Grundy* (*a*) was nearly similar to the present, and in that case the trustees were allowed to prove; but as the objection now under consideration was not made there, and the case was determined on the retrospective operation of the 6 *Geo.* 4. c. 16., that case cannot be adduced as an authority for the present.

Upon the whole, the opinion we have formed is, that the trustees under the marriage settlement ought to be permitted to prove, in respect of their demand, on the grounds and principles we have laid down.

Mr. Justice LITTLEDALE.—I entirely concur with the opinion given by the Lord Chief Justice on this occasion.

Lord BROUGHAM, C.—I also concur with the opinion that has just been given by the learned judges on this point; and I should have added nothing further, but that the Vice-Chancellor in a recent case, *Ex parte Davis*, in the matter of *Wentworth* (*b*), has referred to the decision of Lord *Lyndhurst* in this matter overruling his decision, and which, my opinion concurring

(*a*) 1 Mont. & M. 293. (*b*) 1 Mont. 121.

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with the learned judges who have already expressed their opinions, I am induced to reverse.

It will be observed, that Lord *Lyndhurst*, in deciding this case, considered that it depended entirely on the second point; not dealing at all with the question, whether there was a debt under the 56th section, but as to whether it was such a matter as could be made the subject of calculation. That was the ground on which the learned judges have proceeded; who do not differ with Lord *Lyndhurst* upon this, namely, that if it could not have been capable of calculation, it could not have come under the operation of that section; but, in this case, we rather think it is capable of calculation.

Now the Vice-Chancellor, in dealing with *Ex parte Davis*, in the matter of *Wentworth* (*a*), referred to this case in these words, "When I decided that case, it appeared to me that the words of the 56th section were imperative; on appeal my judgment was reversed by Lord *Lyndhurst*, on the ground that the contingency was such as could not be ascertained. I think it my duty to state, that it does not appear to me that the difficulty of ascertaining the value could be any obstacle; for by the law of England persons are entitled to rights, notwithstanding the physical difficulties there may be in ascertaining those rights." Then his Honor cites a case in *Ambler* of *Warner* v. *Baynes* (*b*), in which, however, it must be observed, that the difficulty was entirely physical, and that that very difficulty arose to the computation of the subject in question; the difficulty of computation being the ground on which Lord *Lyndhurst* proceeded, the cases are identical. The Vice-Chancellor, however, conceived himself to be bound by

(*a*) 1 Mont. 121. (*b*) Ambl. 589.

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Lord *Lyndhurst*'s decision in *Ex parte Tindal*(*a*); for he says, "The Lord Chancellor has however determined a case very similar in principle to this; but if I were at liberty to decide unfettered, I should give my opinion otherwise." Then he dismisses the petition, without costs; that is to say, he decided against the proving; the petition being against a refusal of the commissioners to allow the valuation to be proved.

His Honor decides the case of *Ex parte Davis* precisely on the ground on which Lord *Lyndhurst* decides the case of *Ex parte Tindal* (*a*). Whether his Honor would, if he had considered the matter, have considered there was a difference between those two cases,—he having in the first instance adhered to the opinion he had thrown out that they were the same, and that the same rule should be applied to both,—I shall not take upon myself to determine. My opinion is, that he would on further consideration have found them easily distinguishable. The learned judges and myself have considered them, and we think they are distinguishable. We think, that in the case of *Ex parte Davis* there was no possibility of putting a valuation on the interest; but that here the interest may be valued. The interest to be valued is 4000*l.* payable one year after the decease of the covenantor. Now, suppose his life were valued at ten years purchase, you would only have to take away one year from that period (*b*), and then take the value of the 4000*l.* payable the year after.

(*a*) *Ex parte Eagle* is the name of the case, Mont. & M. 422, which was an appeal from the decision of the Vice-Chancellor in *Ex parte Tindal.*

(*b*) With great deference to his Lordship, it is difficult to discover any

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In the case of *Ex parte Davis* there was not only to be taken into account a calculation of the present value of 100*l.* a year, but something more. First, the bankrupt himself was to receive 100*l.* a year, till his bankruptcy occurred; then, after his bankruptcy his wife was to receive the 100*l.* a year, but only so long as she continued to live with him; then, after his decease she was to receive the 100*l.* a year only so long as she continued a widow. Well, then, those circumstances of living with him, and of continuing a widow, made us think last summer, that the interest was such as that a value could not be put upon it; and consequently upon that ground, and upon that ground alone, the decision must stand. It is affirmed, that we reversed the decision of his Honor in that case; it is clear that that is a mistake; it was affirmed; but his Honor there, holding himself fettered by the opinion of the Lord Chancellor in *Ex parte Tindal* (*a*),—I think upon an erroneous view of that case,—considered that he was bound by it. Still, in point of fact, he decided against the proof, on the ground that it could not be made the subject of calculation; we did not reverse that decision, but affirmed it.

On these grounds, I need only say that I agree with the learned judges whose assistance I have had on this occasion; and we think that the two cases are not

sound principle upon which this mode of calculation rests. The *one year*, it should seem, ought to be *added* to the period of ten years, instead of *taken away* from it, if the life of the covenantor is valued at *ten years* purchase. For the present value of 4000*l.*, payable one year after a period of ten years, is nothing more nor less than the balance that remains of that sum, after deducting *eleven* years rebate of interest.

(*a*) *Ex parte Eagle, re Gibbins*, Mont. & M. 422.

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opposed, but that they stand well together; the one case being a case in which a valuation could not be put.

Order made to reverse the judgment of Lord *Lyndhurst* and allow the proof. The costs of all parties to come out of the estate.

Ex parte JOSE VENTURA DE AGUIRRE SOLARTE, and others.—In the matter of JOAQUIN RUEZ DE ALZEDO, a Bankrupt.

Court of Review, Southampton Buildings, March 8.

The Commissioners have no power, under the 33d and 34th sections of the 6 *G.* 4. c. 16., to examine the executor of a debtor to the bankrupt, as to the amount of assets that have come to the hands of such executor.

THE petitioners in this case were the assignees of the bankrupt, and the petition stated the following facts. The commission issued on the 25th November 1825. An action, which was still pending, had been commenced by the petitioners, as assignees of the bankrupt, against *Sarah Keats*, as executrix of the last will and testament of *Joseph Keats* deceased, to recover the sum of 1370*l.*, and interest due, upon three bills of exchange. The petitioners did not press *Keats* in his life-time for payment of the bills, as they were apprised by him that he was in insolvent circumstances, and unable to pay them; but from information (received by the petitioners since the death of the testator) that such statement was not true, and that the executrix had possessed herself of considerable property belonging to the creditors, the action was commenced. The executrix pleaded the general issue, *plene administravit*, and several special pleas; which, the petitioners alleged, rendered it necessary to examine her before the Commissioner under the commission, for the purpose of inquiring into the truth or falsehood of such pleas; and,

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if true, to ascertain the nature and extent of the property possessed by the testator, and how the same had been disposed of, and to discover if any part thereof could be made available for the bankrupt's estate, in full or part satisfaction of the debt of 1370*l.* and interest. A meeting was accordingly had before Mr. Commissioner *Fane;* but he refused permission for the examination to proceed, upon the ground that he had no jurisdiction, and that such information could only be obtained by a bill in equity.

The petition therefore prayed, that it might be referred back to the Commissioner, or to the Sub-division Court, to proceed in the investigation, by the examination of *Sarah Keats*, and such other persons as should be deemed necessary.

Mr. *G. Richards*, who appeared as counsel for the petitioners, had been provided with a copy of Mr. Commissioner *Fane*'s judgment, which was as follows:

"*Re Alzedo.*

"The assignees of *Alzedo* have summoned Mrs. *Keats*, as executrix of her late husband, to attend before me and submit to be examined. *Alzedo*, as it is alleged, was before his bankruptcy a creditor of the late Mr. *Keats;* and the assignees have brought an action against his executrix, Mrs. *Keats*, to recover that debt. It is to assist that action, that this examination is called for. I am informed, that the object is to ascertain what assets Mr. *Keats* left,—in other words, to have so much of the relief usually obtainable by a creditor against a personal representative in Chancery, as consists of an *account of assets*.

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" I am of opinion, that Commissioners of bankrupt have no jurisdiction to examine *as to such matters*, and I cannot, therefore, permit the examination to proceed as to such matters.

" I assume, that there is no decision upon this subject in print; because, though I called upon those who insisted that I had the power to produce me any authority on the subject, none was produced.

" The question then depends upon the 6 *Geo.* 4. c. 16.

" The 33d section enables Commissioners to summon certain persons; amongst them are persons believed to be capable of giving information concerning the dealings of the bankrupt. Mrs. *Keats* was therefore rightly summoned; for it is reasonable to suppose that the personal representative of a person, who has dealt with the bankrupt, can give some account of the bankrupt's dealings with the deceased.

" The 34th section specifies the points to which the person summoned may be examined. The points are, *the person, trade, dealings, or estate of the bankrupt.*

" The question is, whether these words will authorise an inquiry respecting, not the person, trade, dealings, or *estate of the bankrupt*, but respecting the *estate* left by Mr. *Keats.* It is alleged, that Mr. *Keats* was indebted to the bankrupt; and then it is argued, that as part of Mr. *Keats*' estate ought to become part of the bankrupt's estate by payment of that debt, this inquiry respecting Mr. *Keats*' estate is within the authority which authorizes inquiry respecting the *bankrupt's* estate. I do not adopt this argument. I think I am bound to adhere to the plain and natural meaning of the words, and reject an interpretation so forced. If I were disposed to indulge in speculations upon the

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views which influenced the legislature, in giving the Commissioners of bankrupt the extraordinary powers of inquiry entrusted to them; I should say, that the object was to counteract fraudulent concealments by bankrupts, by enabling the Commissioners to procure, by *vivâ voce* examination on oath, as well of the bankrupts themselves, as of those who had dealt with them, information as to all those matters, which, in the ordinary course of business, lie within the knowledge of traders; but not as to any thing else. This principle would entitle the assignees to inquire of Mrs. *Keats*, as to all the particulars of the transactions out of which the debt arose, (and that they may do,) but not as to the assets left by Mr. *Keats*. As to the former, the assignees may reasonably be expected to know less than their bankrupt; as to the latter, they do not know less; for neither they nor their bankrupt could know any thing.

" The assignees, I think, are, as to this, in the situation of common creditors; if they want an account of assets, they must seek it by bill in Chancery.

(Signed) " *R. G. C. Fane.*"

Mr. *G. Richards* now submitted to the Court, that the judgment of the Commissioner was incorrect. Under the 33d and 34th sections of the 6 *Geo.* 4. c. 16., the Commissioner had clearly power to examine Mrs. *Keats*. [*Erskine*, C. J. There can be no doubt that the Commissioner had power, under the 33d section, to examine any person whatever; but the 34th section limits the subject-matter of that examination to " the person, trade, dealings, or estate of the *bankrupt*;" and the questions you wanted to put to the executrix,

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related to the estate of *her husband*. Supposing you had put these questions to her, could you have compelled her to give you an answer?] The 33d section gives power to the Commissioners to examine any person, who is indebted, or supposed to be indebted, to the bankrupt. Now, clearly, if *Keats* had been alive, he might have been examined by the Commissioner; and ought his executrix to be placed in a different situation? If the assignee had Mrs. *Keats* before the Commissioner for examination, he would ask her, "Have you received 10,000*l.*?" The answer would be "Yes." He would then ask her, "How much have you paid?" And if the answer were 5000*l.*, it is clear that her plea of *plene administravit* would be shown to be false, and the assignee would be able to get a judgment *de bonis propriis* of the executrix. If he is not afforded this means of ascertaining the truth, he is driven to file a bill of discovery. [*Erskine*, C. J. There is no doubt as to your right to examine *Keats*, or his executrix, touching the estate of the bankrupt; but have you a right to ask a debtor to the bankrupt, "What means have you of paying this debt?"] The debtor to the bankrupt becomes the debtor to the estate; and if there is sufficient property, either in part or in whole, to answer this demand of the assignees, that property becomes the "estate" of the bankrupt; and, as such, it is a matter that may be inquired into by the Commissioners. The assignees have therefore a right to examine Mrs. *Keats*, as to the property of her husband, in order to determine them as to the propriety or utility of their proceeding further in the action.

Mr. *Swanston*, who appeared for Mrs. *Keats*, was stopped by the Court.

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ERSKINE, C. J.—The whole question is, whether the Commissioner has, or has not, the power to examine Mrs. *Keats* as to the property of her deceased husband, to whom she is executrix. I am decidedly of opinion, that he has not. He has, certainly, power to examine her, touching the *bankrupt* and his estate; but this power of examination cannot be extended to matters more properly connected with the estate of *another person*. Look at the words of the act. The 33d and 34th sections give power to summon and examine certain persons, "concerning the person, trade, dealings, or estate of such bankrupt." Now, can you say, that the proposed examination concerns either the *person, trade*, or *dealings* of the bankrupt? Certainly not. Then, does it concern the *estate* of the bankrupt? I conceive it to be the estate of the *testator*, and not that of the *bankrupt*. For how can you say, this is the estate of the bankrupt, merely because an indefinite part of it may be liable to discharge a debt due to the bankrupt? On the whole, therefore, I feel satisfied, that the Commissioner has pronounced a right judgment.

Sir A. PELL.—I am of the same opinion. If the proposed examination were to be allowed, the private affairs of every person might be subjected to public exposure, merely for the purpose of gratifying curiosity. It would be monstrous to suppose, that the legislature could have intended to lay bare the whole private affairs of an individual, merely because he owed money to a bankrupt; or that property of a bankrupt in the hands of a debtor should at once become the property of his creditors, without consent or process.

Sir J. Cross and *Sir* G. Rose concurred.

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The petition was therefore dismissed with costs, which, by arrangement, were directed to be paid out of the estate.

In the matter of Knox.

Southampton Buildings, March 8.

Where a commission (issued before the new act) had been transferred to one commissioner, and a *fiat* against the same bankrupt had been directed to another; the Court ordered the commission to be transferred to the Commissioner, to whom the *fiat* was directed.

It appeared in this case, that a *fiat* had lately been awarded against the bankrupt by the name of *Knox;* and that a commission of bankruptcy had been previously taken out against him, and was still pending, in the name of *Wicks.* The commission was one of those which had been transferred to Mr. Commissioner *Evans;* and the *fiat* had been directed to Mr. Commissioner *Fane.*

Mr. *Jacob* now moved,—upon the certificate of Mr. Commissioner *Fane,* that such proceeding would be beneficial to the estate,—that the commission should be transferred from Mr. Commissioner *Evans* to Mr. Commissioner *Fane,* in order that the commission and *fiat* might be worked together.

The Court made the order accordingly.

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Southampton Buildings, March 10.

Where an equitable mortgagee of leasehold property applied for a sale, the Court refused to order him to indemntfy the assignees against any breach of covenants in the lease; but gave the assignees time to consider, whether they would accept or reject the lease.

Ex parte FLETCHER.—In the matter of COLLINS and PRIOR.

THIS was the petition of an equitable mortgagee of leasehold property, which prayed, that the assignees might be directed to sell the property, and for leave to bid at the sale.

Mr. *Blunt* appeared in support of the petition.

Mr. *Spurrier*, on behalf of the assignees, contended, that so much of the prayer of the petition as related to a sale could not be granted. The premises in question being leasehold, if the assignees meddled with the property in any way, though even for the purpose of joining in a sale, they would become responsible for any breach of the covenants of the lease as between themselves and the lessor. If the equitable mortgagee had, as he might have done, taken an assignment of the lease in the first instance, then the assignees would have been saved from all the risk arising from any subsequent breach. And as the Courts had been always adverse to equitable mortgages by deposit only, if the Court did grant that part of the prayer asking a sale, it ought, at least, to order the petitioner to indemnify the assignees against the breach of any of the covenants in the lease.

The COURT, however, were of opinion, that they could not impose any terms on the petitioner. It was in the option of the assignees, under the statute, either to accept or to reject the lease. If they took to it, they must also take all the responsibility attaching to it.

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The utmost the Court could do was, to give the assignees a reasonable time to consider, whether they would accept or reject the lease.

The petition, therefore, stood over for that purpose.

Ex parte TODD.—In the matter of WILLIAM JENNER.

March 10.

The Court refused leave to amend a *fiat* which had been opened, on account of a slight misdescription of the bankrupt's residence.

THIS was an application by motion for leave to amend a *fiat*, under the following circumstances. In the affidavit of the petioning creditor's debt, as well as in the *fiat* and the advertisement in the Gazette, the bankrupt was described as of "East Street, Paddington;" whereas the proper description was "East Street, Paddington Street, Mary-le-bone." Application had been made on a former day for leave to amend the *fiat*, —or, in the alternative, that a new *fiat* might issue,— upon which an order had been obtained; but the officer at the bankrupt office had declined drawing up the order, intimating that such a course had never been taken before. The *fiat* had been opened.

Mr. *G. Richards*, in support of the application, submitted that this indulgence ought to be granted; otherwise the party would be put to the expense of taking out a new *fiat*, unless the Court would order the 10*l.*, which had been deposited on issuing the first *fiat*, to be accepted as a deposit for the second. The present *fiat* was perfectly good in substance; and the only inconvenience attending it would be, that if it were ever dis-

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puted, they would perhaps be compelled to prove the identity of the bankrupt with the party described in the fiat.

Erskine, C. J.—The objection to granting this motion is certainly, in my mind, only one of form. But, as this is the first instance of an application of this nature which has been brought before us, and is likely to become a precedent for future occasions, I think it advisable not to come to too hasty a decision upon it. The difficulty I feel is, that a *fiat*, by the act of the 1 & 2 *Will.* 4. c. 56., becomes of record, and it is incompetent for any court to amend its records, without something to amend by. Put the case of a recovery. The Court of Common Pleas never amends a recovery, without having the deed to lead the uses before the Court, to guide it in such amendment. And I do not think it would have made any difference, if the *fiat* had never been opened. As to the return of the deposit, I cannot see that this Court has any power to order it to be returned, or that it shall be considered as made in respect of a second *fiat*,—supposing it should be necessary to take one out.

Sir J. Cross(*a*) concurred.

Sir G. Rose.—I certainly think that this *fiat* is perfectly correct in substance, and quite sufficient to maintain the future proceedings; but it is still liable to the objection pointed out by Mr. *Richards*. If this were a case of competition between two applicants for a *fiat*, then this mis-description might have given that party, who comes the best prepared, the priority in obtaining it.

(*a*) Sir A. Pell was absent.

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The Court having directed the case to stand over till this day, the Chief Justice now said, the Court thought it would not be safe to establish the precedent of altering a *fiat*, which was matter of record, without something to guide them in making the amendment. Whereupon Mr. *Richards* took the order directing a new *fiat* to issue.

Ex parte Page.—In the matter of Hill.

March 12.

Substitution of a new trustee, where the former one becomes bankrupt.

Mr. *Montagu* applied, on behalf of the petitioner, a married woman, for leave to substitute a new trustee in the place of the former one, who had become bankrupt. The facts were, that the bankrupt was trustee for his wife of a fund to which she only was entitled; and it was proposed to substitute the bankrupt's son, with liberty for him to prove under the commission, and receive the dividends, without any reference to the Master, the fund being too small to bear the expense of such a proceeding; and he cited *Ex parte Inkersole* (*a*).

The Court, on referring to the 6 *Geo.* 4. c. 16. s. 79. granted the order as prayed (*b*).

(*a*) 2 G. & J. 230.

(*b*) And see *post*, *Ex parte Vine*.

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Southampton Buildings, March 12.

Where an assignee, on being chosen, accepts the office, he can only retire, on payment of the costs occasioned by his removal.

Ex parte WATTS.—In the matter of HENFREY.

THE petitioner in this case had been appointed, and had accepted the office of, assignee of the bankrupt's estate; and he now prayed, that he might be permitted to retire from that office, and that a new choice might be directed to take place; and that it might be left in the discretion of the Commissioner, whether the petitioner should pay the costs of this application, and of the new choice; or, if the Court thought he ought to pay the costs of this application, then that the costs occasioned by the new choice might in like manner be left to the discretion of the Commissioner.

The COURT held, that an assignee, having taken upon himself the office, could only retire, on paying all the costs occasioned by his removal; and that there was no reason in this case, why the estate should be burthened with any part of this expense.

The petition was consequently dismissed (*a*).

(*a*) See *Ex parte James, ante*, 273, n. (*a*).

Southampton Buildings, March 13.

Though the appearance of a party is wholly unnecessary, yet if he is served with notice of an intended application to the Court, he is entitled to his costs of appearance. But if he makes affidavits which are unnecessary, he must pay the costs occasioned thereby.

Ex parte REID.—In the matter of MILLS.

THE question of costs in the matter of this petition (*b*) had been directed to stand over. One of the parties, who was not concerned in that question, had been served with notice of its coming on this day to be heard,

(*b*) See *ante*, 249.

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Ex parte Reid.

and had filed very long affidavits,—which, as he was not liable to the costs of the petition, were therefore wholly unnecessary. The party, however, who had served him, had taken office copies of the affidavits; and the question now arose, who was to pay the costs of these affidavits.

The Court determined that, though his appearance was altogether unnecessary, yet having been served with notice, he was entitled to his costs of appearance. But with regard to the affidavits,—inasmuch as the other side could not know whether they were material or not, without taking office copies of them,—they were therefore justified in taking such copies; and the affidavits proving wholly unnecessary, the Court directed the party filing them to pay the costs occasioned thereby.

Ex parte Goding and Morris.—In the matter of James Crow Easling.

Southampton Buildings, March 14.

The Court will not sanction a sale of the bankrupt's property by private contract, without a previous reference to the Commissioners.

THIS was a petition by assignees, stating, that the bankrupt, who had kept a public-house called "The Black Prince," had deposited the lease of the house with Messrs. *Calvert* & Co., as a security for 1400*l.* advanced by them to him. The lease, goods, and fixtures had been valued by an appraiser at 800*l.*, which the petitioners considered the full value, and more by 100*l.* than the same would fetch if put up to sale by public auction. Messrs. *Calvert* & Co. had offered to take the lease at 700*l.*, and the goods and fixtures at 200*l.* more; the adoption of which offer, the

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Ex parte GODING and another.

petitioners conceived, would be most beneficial to the general estate of the bankrupt. The petitioners therefore prayed, that they might be authorized to accept this offer of Messrs. *Calvert* & Co.

Mr. *Blunt* for the petition.

The COURT held, that it could not sanction a sale by private contract, without a reference to the Commissioners, to ascertain if such a mode of disposing of the bankrupt's property would be beneficial; and therefore directed the usual reference, to inquire whether it would be for the benefit of the bankrupt's estate, to dispose of the lease to Messrs. *Calvert* & Co., upon the terms proposed in the petition.

Lincoln's Inn Hall, coram Lord Chancellor and Vice-Chancellor, February 18.

Ex parte BENSON. } In the matter
Ex parte LANCASTER CANAL COMPANY. } of DILWORTH.
Ex parte LANGSTON.—In the matter of HARDY.
Ex parte ELSEE.—In the matter of JOYNER.

The Court of Review has no jurisdiction to hear a petition of appeal to the Lord Chancellor from an order of the Vice-Chancellor; nor a petition for the rehearing of a petition of appeal already heard by the Lord Chancellor; nor a cross petition of appeal to the Lord Chancellor, complaining of a particular part of the order of the Vice-Chancellor.

But it has jurisdiction to hear a petition to the Lord Chancellor for confirming the Master's report, where the Lord Chancellor had made an order on a previous petition, referring the matters therein to the Master;—or a *supplemental* petition of appeal to the Lord Chancellor from an order of the Vice-Chancellor, where such petition is upon new grounds, which were not brought forward by the original petition, or by the petition of appeal;—or a petition to the Lord Chancellor, praying only consequential directions on one part of an order made by the Vice-Chancellor, against which no petition of appeal had been presented.

THESE petitions were brought on for argument together, by the direction of the Lord Chancellor; a preliminary question having arisen in the discussion of each of them, with respect to the continuance of the Lord Chancellor's jurisdiction in bankruptcy subse-

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quently to the 11th January 1832, the day on which the new Bankruptcy Court Act (1 & 2 *Will.* 4. c. 56.) came into operation. The circumstances under which these several petitions came before the Court were different, raising the point of jurisdiction somewhat differently in each particular case. They are, however, so minutely and accurately detailed in the judgment of his Honor the Vice-Chancellor, that it is unnecessary here to specify them. His Honor was on this occasion called in to the assistance of the Lord Chancellor, when the question of jurisdiction was elaborately discussed before them by

Sir *William Horne*, S. G., Sir *Edward Sugden*, Mr. *Montagu*, Mr. *Duckworth*, Mr. *Jacob*, Mr. *Goldart*, and Mr. *Booth*, who were heard at great length for the various parties interested. The general line of argument adopted by the counsel was similar to that which was resorted to in the Court of Review, where the same subject came under discussion in the case of *Ex parte Lowe*, in the matter of *Aaron* (*a*), which is reported in the first number of the present volume.

At the close of the argument the Lord Chancellor said, that as the question was one of some nicety, and also of great importance, in regard to a number of petitions of appeal from the Vice-Chancellor, which were now pending, and waiting for a hearing till the decision upon these petitions should be known,—and as it was highly desirable that all doubts upon the point should be finally set at rest,—the Court would take time to consider its judgment.

(*a*) See *ante*, p. 79.

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Ex parte Benson and others.
March 13.

On this day the Lord Chancellor and Vice-Chancellor, having taken their seats on the bench, proceeded to deliver the following judgments.

Sir Lancelot Shadwell, V. C.—There were several applications made to the Lord Chancellor in different matters of bankruptcy; the first was the case of *Ex parte Benson*, in the matter of *Dilworth*. In that case the Vice-Chancellor had dismissed the petition, with costs; and an appeal was presented to the Lord Chancellor, which came on to be heard on the 19th of August, and was ordered, by consent, to stand over generally; and it remained in the paper of the Lord Chancellor for hearing, till the 12th of January last. It was insisted by Sir *Edward Sugden*, for the respondents, that the Lord Chancellor was bound to hear that appeal, and that he alone could hear it. And Mr. *Booth*, for the petitioners, insisted, that the Court below had at least concurrent jurisdiction, and that the petitioners had a right to exercise their option before which Court they would have it heard.

In the case of *Dilworth, Ex parte The Lancaster Canal Company*, it appears, that the petitioner prayed a sale of some securities, and for leave to prove for the balance beyond what the securities might produce: and the Vice-Chancellor granted the prayer of the petition. Upon looking at the petition of appeal, which was handed up to me while the matter was going on, I observed that Lord *Lyndhurst* affirmed the order, but not upon the ground which was taken by the Vice-Chancellor; and the present petition before the Lord Chancellor was therefore presented for a rehearing of the petition of appeal, and a revision of the order made

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by Lord Chancellor *Lyndhurst*. And in that case, also, Sir *Edward Sugden* insisted, that the petition ought to be heard by the Lord Chancellor; suggesting, that his lordship alone could hear it.

There was another petition in the matter of *Hardy* and *Houghton*, where it appears that the Lord Chancellor had made an order, referring the matters in the petition to the Master. The Master made his report; and then a petition was presented in the month of December last, praying that that report might be confirmed; and it seems that the petition was called on, and marked as part heard, before the 11th of January, in the presence of counsel on both sides. It was stated at the bar, that Mr. *Jacob* had appeared as counsel for the respondents, and that in his presence an order was made, adjourning the petition; but it certainly did not appear to me, from any thing that was stated, that that interference on his part could be taken as legitimately amounting to a consent. And I understand there are also other petitions before the Lord Chancellor, which stand in this situation.

In the matter of *Joyner* and others, bankrupts, *Ex parte Elsee*, a petition of appeal was presented from an order made by the Vice-Chancellor; and after that petition of appeal had been presented, a cross-petition of appeal was presented by the assignees, complaining of a particular part of the order, which was not brought before the notice of the appellant Court by the original petition of appeal; and, pending the petition of appeal, a supplemental petition was presented by those who presented the original petition of appeal; which petition prays, that his lordship would make an order, (part of the order asked for by the petition below, but which was

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refused by the Vice-Chancellor, and which is not made the subject of appeal by the original petition,) but asking for that order, on new facts for the first time brought forward in the supplemental petition; and it also appears, that in the same matter there has been a petition presented, which prays only consequential directions on a portion of the order made by the Vice-Chancellor, against which no petition of appeal has been presented, either by the original appellants, or the cross-appellants.

This, then, is the situation in which these several matters stand, with respect to which the questions have been raised. Now the act of the 1 & 2 *Will.* 4. c. 56., upon which these various points of jurisdiction have arisen, states in its preamble, (first of all reciting the act of the 6 *Geo.* 4. c. 16.) "that it is expedient to provide means of administering and distributing the estates and effects of bankrupts, and of determining the questions which from time to time arise touching the same, other than are provided by the said act;" and then, "to the end that the rights as well of the bankrupts themselves, as of their creditors, may be enforced with as little delay, expense, and uncertainty as possible, be it enacted, that it shall be lawful for his Majesty to create a Court." Now it is observable, that the very intent, which the legislature declared itself to have in view, is embodied and consolidated with that very sentence which creates the enactment, "that it shall be lawful for his Majesty to establish a Court of Review." And then in the second section it is declared, "that the judges shall also have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order and allow,

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all such matters in bankruptcy as now usually are, or may be, brought by petition, or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy, or elsewhere, except as is herein otherwise provided." And then it is provided in the third section, "that all such matters to be heard and determined in the said Court of Review shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as hereinafter provided; subject to an appeal to the Lord Chancellor on matters of law or equity, or on the refusal or admission of evidence only; and in all cases of appeal to the Lord Chancellor by virtue of this act, such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct." And then it is provided, "that the determination of the judge on the settlement of such case shall be final, and all appeals to the Lord Chancellor by virtue of this act shall be heard by the Lord Chancellor only, and not by any other judge of the High Court of Chancery." Now, it does appear to me, that it is sufficiently to be collected from the enactment in the first section, coupled with what I find in the second and third, that *primâ facie* the jurisdiction of the Lord Chancellor in matters of bankruptcy is taken away; and I should say, taken away, except so far as you can collect on the face of the act itself, that it must of necessity be preserved. It was said, that where there has been an existing jurisdiction, which therefore might be called a concurrent jurisdiction, with a view to one that is newly created,—*that* cannot be taken away, except by express words; and in support of that observation, a case was

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cited from *Saville*'s Reports, which, on the face of it, I think appears to be a very singular case. It is the case of *Agard* and *Candish*, *Saville*, 134. It was an information in the Court of Exchequer under the statute of *Edw.* the 4th, for a penalty of *5l.* for giving and wearing liveries; and on the general issue it was found for the queen; and *Tanfield* moved, that the action did not lie in the Exchequer, by the express words of the statute, which gave the action in the Common Bench, and King's Bench, before justices of the peace, or justices of Oyer, but not a word of the *Exchequer*. He admitted that where an action could be brought at common law before, and a statute gives a new remedy by a new action, there the ancient remedy at common law is not taken away; but he contended that in that case there was no such action at common law; and therefore, if not given by the statute to the Court of Exchequer, it would not lie in that Court. There is some further reasoning in the case, and then it is said, that the Barons were of opinion, that the action will lie in this Court: 1. Because it was for the queen; 2. Because there were no restraining words; 3. Because this Court was not like the sessions of the peace, and because inferior Courts shall take no authority under a statute, unless they are specially named; but a superior Court shall have authority, although it is not named specially, unless it is prohibited or restrained by negative words.

Now, with respect to this particular case in the Court of Exchequer, the penalty was created for the first time by the statute; and the very statute, which created the penalty, pointed out the mode in which the penalty should be recovered; and it also named the

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express Court, in which it should be recovered. Therefore, it seems a strong determination, that the Court of Exchequer should have that jurisdiction with respect to a penalty for the first time created, with appointed means of suing for it (*a*). But whatever may be the authority of that case, it seems that a more liberal view of the law has been taken in a more modern case, namely, that of *Cates* v. *Knight*, and *Cates* v. *Mellish* (*b*). In that case there were actions brought to recover damages under the 25 *Geo. 3. c.* 51.; and some of the counts of the declaration were for the penalty of 50*l.*, which could only be sued for in the superior Courts; and the other counts were for the 10*l.* penalty, which apparently could only be sued for in the inferior Courts. After the trial a verdict was taken on the counts for the lesser penalties only; and Mr. Serjeant *Bond* moved to arrest the judgment, on the ground, that no penalty under 50*l.* created by the statute could be sued for in the superior Courts. The 57th section enacted, that all penalties of 50*l.* should be sued for in any of his Majesty's Courts of Westminster; and the 59th section provided, that any justice of the peace, residing near the place where the offence should be committed, might hear and determine any offence against that act which subjected the offender to any pecuniary penalty not amounting to 50*l.*, and to convict &c. And it

(*a*) With great deference to this able judgment of the Vice-Chancellor,—it would seem, that as a penalty is a debt due to the crown, and the primary and original constitution of the Court of Exchequer was to recover the king's debts and duties, that Court might therefore with equal reason claim paramount jurisdiction in all matters of this description, as the Court of King's Bench in criminal matters, unless the jurisdiction is taken away by express words in an act of parliament.

(*b*) 3 T. R. 442.

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appears, that Lord *Kenyon* in giving judgment said, "It is clear, that the legislature inserted this clause for the benefit of the prosecuted: and they enacted, that when a party should incur one of the smaller penalties of the act, he should be sued before a magistrate, in order to prevent his being saddled with the unmerciful costs of a merciless prosecutor. I think we are acting up to the full intent of the legislature, in saying that these penalties can only be recovered before a magistrate." And Mr. Justice *Ashhurst*, who also expresses himself in concurrence with Lord *Kenyon*'s judgment, says, "generally speaking, this Court cannot be ousted of its jurisdiction, but by express words, or by necessary implication, any more than an heir at law of his inheritance; the necessary implication in both instances is engrafted on the general rule." And then he says, "nothing can be clearer than the intention of the legislature in this instance." Now, in that case, power to sue for the 10*l.* penalty was given to the prosecutor, which applied to the lower Courts. The act for the first time created the 10*l.* penalty; but the ground of judgment, which was taken in the case of *Agard* and *Candish*, was not allowed to prevail; and Mr. Justice *Ashhurst* puts it, that nothing could be clearer than the intention of the legislature. Therefore I conceive, that this case, which is a subsequent case, and one which received great consideration, does take away the authority of the case of *Agard* and *Candish*; and that the question to be considered is, whether the intention of the legislature does sufficiently appear upon the statute, where there are positive words, and no negative words. Now, in the present case, the legislature has declared that the intent of all these

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enactments of the act is, that the rights as well of the bankrupts themselves, as of their creditors, are to be enforced with as little delay and uncertainty as possible; evidently implying, that the jurisdiction which existed down to the time of passing the act was a jurisdiction, which was attended with more expense, with more delay, and with more uncertainty, than it was then convenient should be allowed to exist. Therefore, to the intent that the law in that department may be exercised with as little expense, delay, and uncertainty as possible, a new jurisdiction is created; and it does appear to me, that there would be an inconsistency in saying, that generally the jurisdiction of the Lord Chancellor was intended by the legislature to remain, after this intention has been so clearly pointed out, that there should be a new jurisdiction, with the reason assigned. And I cannot but myself feel that, *primâ facie*, the jurisdiction of my Lord Chancellor in cases of bankruptcy is taken away; but then it is not taken away further, than as you can collect was the intention of the act. And when I find, that this act itself reserves to the Lord Chancellor the power of sitting as an appellant judge upon the decisions of the newly created Court; it does appear to me, that there would be a gross inconsistency in saying, that with respect to matters which have received the authority or decision of my Lord Chancellor, they shall be subject to the revising power of an inferior jurisdiction. The consequence of that would be, that in the first case, the judge, who is to be the ultimate judge of appeal, has decided the point,—the subordinate Court may then take on itself to reverse his lordship's decision,—and if there should be error in law or equity, or any question arising

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on evidence in that decision, then he may sit as the appellant judge, to determine the question between himself and the Court below. And I am therefore of opinion,—inasmuch as there is this appellant power given to the Lord Chancellor, and inasmuch as throughout the act there is the originating power vested in the Lord Chancellor, as to the issuing of every fiat,—that in all cases where the Lord Chancellor himself has decided the point in bankruptcy, it is not competent to the Court of Review to call in question that decision.

The next point will be,—if there be a case of exemption from the general operation of the act, with respect to the decisions that have been made by the Lord Chancellor,—what is the case with respect to those decisions that have been made by the Vice-Chancellor? Now, by the act of parliament which first of all constituted the office of Vice-Chancellor (*a*) it is declared in express words, that the Vice-Chancellor has power to determine not only matters which, by the general course of the Court the Lord Chancellor would determine, or which by any subsequent act of parliament he might determine, but all those which, by virtue of any subsequent act, might be committed to the jurisdiction of the Lord Chancellor; for the words are, he "shall have full power to hear and determine all causes, matters, and things, which shall be at any time depending in the Court of Chancery of England, either as a Court of law, or as a Court of equity, or incident to any ministerial office in the said Court, or which have been or shall be submitted to the jurisdiction of the said Court, or of the Lord Chancellor, by the special authority of any act of parliament, as the Lord Chancellor shall

(*a*) 53 *Geo.* 3. c. 24.

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direct." (*a*) And I make that observation, because it is remarkable that, with respect to the act of the 6 *Geo.* 4. c. 16., the person who is appointed to exercise the jurisdiction is the Lord Chancellor, *nominative;* with a proviso in the last section but one, that what is said of the Lord Chancellor shall be taken to apply to the Lord Keeper of the Great Seal, and the Lords Commissioners for the time being; but not one word of the *Vice-Chancellor;* and yet, under the authority of the stat. 53 *Geo.* 3. c. 24., the *Vice-Chancellor* has uniformly exercised the same jurisdiction under the act of the 6 *Geo.* 4., as he did before the 6 *Geo.* 4. was passed. The second section of the Vice-Chancellor's act goes on to declare, "that all decrees, orders, and acts of the Vice-Chancellor, so made or done, shall be deemed and taken to be respectively, as the nature of the case shall require, decrees, orders, and acts of the said Court of Chancery, or of such incident jurisdiction aforesaid, or under such special authority as aforesaid, and shall have force and validity, and be executed accordingly; subject nevertheless in every case to be reversed, discharged, or altered, by the Lord Chancellor for the time being." And I apprehend, therefore, there is an express legislative enactment, which puts on an equal footing the orders of the Vice-Chancellor made on matters of bankruptcy, with the orders of the Lord Chancellor; except, so far as the authority of the Lord Chancellor shall interfere to reverse or alter the decree made by the Vice-Chancellor. And it does therefore appear to me, that,—having regard to the Vice-Chancellor's act,—the exemption from the operation of the Court of Review, upon the orders of the Lord Chan-

(*a*) Section 2.

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cellor in bankruptcy, must be extended to the orders of the Vice-Chancellor in bankruptcy.

The sum, therefore, of the opinion which I humbly offer to his lordship is,—that in all cases where the Lord Chancellor has made an order, that order is irreversible, except by his lordship's authority; and that in cases, also, where the Vice-Chancellor has made an order, the order is equally irreversible, except by the Lord Chancellor's authority; but that in all other matters,—in which the question, whether an order made in bankruptcy by the Lord Chancellor, or the Vice-Chancellor, shall be affected, is not raised,—the Court of Review was intended to have the jurisdiction. Applying these general propositions to these particular cases, I think the course that ought to be pursued is this—

In the case of *Ex parte Benson*, in the matter of *Dilworth*, where the appeal has been presented to the Lord Chancellor, the appeal should be heard by the Lord Chancellor.

In the case of *The Lancaster Canal Company*, in the matter of *Dilworth*,—where my Lord *Lyndhurst*, as I understand, affirmed the order of the Vice-Chancellor, though on a different ground, and a petition for rehearing is presented, to reverse that decision,—that petition must also be heard by the Lord Chancellor.

In the case of *Hardy, Ex parte Langston*,—where the Lord Chancellor had made an order referring matters to the Master, who has made his report,—the proceedings taken for the purpose of confirming the report, and acting upon it, should be removed to the Court below; because I apprehend, that that case stands precisely in the same situation as an original petition. What has antecedently been done is fixed, and what is hereafter

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to be done on the report remains for a new jurisdiction to determine; in the same way, as we know it to be practised every day in the Court of Chancery, that if his Honor the Master of the Rolls, or the Lord Chancellor, makes an original decree, and a report is afterwards made, the cause is set down for further directions, and heard upon further directions, before the Vice-Chancellor. And though the act which constituted the Vice-Chancellor's Court has declared, that no decree made by the Master of the Rolls shall be touched by the Vice-Chancellor; yet if a matter is heard originally by the Vice-Chancellor,—as a matter of course, the hearing on further directions may go before the Master of the Rolls.

With respect to those petitions which relate to the matter of *Joyner*'s bankruptcy, I should humbly offer my opinion to his lordship, that the original petition of appeal, and the cross-petition of appeal, should remain to be adjudged upon by his lordship; but that the supplemental petition of appeal, which is upon new grounds not brought forward by the original petition before the Vice-Chancellor, or by the petition of appeal, should remain to be heard in the Court of Review, and not by his lordship,—altogether precisely the same as if there had been no appeal or cross-appeal, but as if for the first time the facts disclosed in this petition had been brought forward before the new jurisdiction in bankruptcy. And with respect to the last petition in the bankruptcy of *Joyner*, it appears to me,—inasmuch as it merely brings forward the question, what consequential directions shall be given upon some proceeding which has arisen out of a part of the original order, from

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which no appeal has been presented,—that it should be heard by the Court of Review.

This is the opinion, which I have formed upon these several matters, and which I now humbly tender to his lordship.

Lord Brougham, L. C.—I have considered this case during the argument, and since the argument I have had the benefit of his Honor's assistance, for which I am extremely grateful, who has attended to it with the greatest possible care, and bestowed very great labour and pains upon it. And I agree in the conclusion to which his Honor has come, upon all the points which he has now addressed himself to. It is not necessary, in affirming the jurisdiction of this Court, in respect of the appeal or rehearing of matters disposed of either by his Honor the Vice-Chancellor, or by this Court, to disaffirm the jurisdiction of the Court of Review; nevertheless, I agree with his Honor in the opinion which he has stated. I think it fit, therefore, I should mention, that I so agree that that Court has not jurisdiction in overruling, or in truth dealing in any way with, matters that have been disposed of either by the Lord Chancellor, or by the Vice-Chancellor. The words in the second section, no doubt, are extremely large; and if taken strictly and according to the letter, they would include every thing, and give jurisdiction to the Court of Review in every thing, which could be treated of, and which could be dealt with, either by the Lord Chancellor, or by the Vice-Chancellor,—" and shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction,

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and authority to hear and determine, order and allow, all such matters in bankruptcy as now usually are, or lawfully may be, brought by petition, or otherwise, before the Lord Chancellor; whether such matters may have arisen in the said Court of Bankruptcy, or elsewhere, except as is herein otherwise provided." Consequently, the rehearing of his own order, or the order of his predecessor, or the rehearing of the matter disposed of before his Honor the Vice-Chancellor, comes, strictly speaking, within this description. It might be contended that, according to these precise and express words, the Court of Review has jurisdiction. Nevertheless, I think we are, upon the whole, to give a reasonable construction to it; and that his Honor has come to a sound and just conclusion, when he holds that the jurisdiction of the Court does not extend to hear matters, that have been heard and disposed of in this Court on appeal (*a*).

With respect to the jurisdiction of the Court, prospectively, in all matters arising in bankruptcy henceforth under the *fiat*, I consider the jurisdiction of this Court is so transferred to the Court of Review; and that the Court of Review could only be controlled and superintended by this Court, by an appeal in matters of law or equity in the way pointed out, either by special case, or in any other mode which in the peculiar circumstances of the case may seem proper.

I have had much more doubt on the other point, which applies to the matters which are now pending, and to which his Honor has also addressed himself;

(*a*) It appears, that his lordship on the present occasion found reason to alter the opinion which he originally expressed upon this question. See *Ex parte Lowe, re Aaron, ante*, 31.

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but, upon the whole, I come to the same conclusion with his Honor, that they must follow the same rule, and that the jurisdiction of this Court is excluded, and that the Court of Review has exclusive jurisdiction.

In adopting the course which his Honor recommended, and in which I entirely concur, it is not necessary, in dealing with the two first cases of *Ex parte Benson,* in the matter of *Dilworth,* and *Ex parte The Lancaster Canal Company,* to do more than to affirm the jurisdiction of this Court.

In *Ex parte Langston,* in the matter of *Hardy,* for the reasons stated by his Honor, I am of opinion that the further proceedings must go to the Court of Review; and that that Court appears clearly to have jurisdiction in these matters, and I think his Honor has taken the sound distinctions.

In the matters arising out of the bankruptcy of *Joyner,*—where matters have been heard, and are to be reheard by way of appeal,—there again it is not necessary expressly to disaffirm the jurisdiction of the Court of Review; though, as I have before said, my opinion certainly is, that they have not jurisdiction. But in those matters which are, as it were, original,—either altogether, or new matters upon what has before been disposed of, and upon the foot of what has been before disposed of,—I am of opinion that, disaffirming the jurisdiction of this Court, those go to the Court of Review.

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Ex parte RAY.—In the matter of RICHARD WILSON.

Southampton Buildings, March 19.

When a renewed *fiat* is prayed by a creditor, by reason of the death of Commissioners, the assignees must be served with the petition.

THIS was the petition of a creditor of the bankrupt, that a renewed *fiat* might issue. The original commission issued in April 1816, and was directed to Commissioners in Staffordshire. The ground of the application was, that two of the original Commissioners were dead, and another had declined from the beginning to act under it in any way whatever. It appeared, that there were still assets to be administered under the commission.

The COURT held, that the petition could not be heard, until the assignees had been served with the petition.

Ex parte PALMER.—In the matter of PALMER.

March 22.

A bankrupt is not prevented, by the 17th section of the 1 & 2 *Will.* 4. c. 56., from applying to supersede, although two months have elapsed from the date of the adjudication.

The Court has the power, under the 38th section, after hearing a case partly on affidavit, to examine *vivâ voce* the parties who have made affidavits.

When the Court makes a general order for the examination of the parties on the hearing of a petition, there is no need for a special order as to any particular witness; but the proper course is to take out a *subpœna*.

THIS was a petition by the bankrupt, for superseding a commission issued against him on the 19th November 1831, on the ground that he had committed no act of bankruptcy, and that his estate would pay all his creditors 20*s.* in the pound. The petition contained a long statement of facts, which was supported and contradicted by various affidavits, filed on behalf of the petitioner and the respondents. But the only material points that occurred in the argument on the hearing of the petition were: *first*, whether, as it was presented two months after adjudication, the bankrupt had any *locus standi in curiâ*, within the intent and meaning of the 1 & 2 *Will.* 4. c. 56. s. 17; and, *secondly*, whether

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the Court of Review, after hearing a case on affidavit, had power to order the parties and deponents to be examined before it *vivâ voce.*

Mr. *Koe* and Mr. *Bethel,* for the respondents, raised the *first* point, on a preliminary objection to the petition being heard. By the 17th section of the Bankruptcy Court Act it is declared, "That if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the Court of Review, *such petition to be presented within two calendar months from the date of such adjudication,* if such trader shall be then residing within the United Kingdom; or within three calendar months from the date aforesaid, if then residing in any other part of Europe; or within one year from the date aforesaid, if then residing elsewhere; or within such other time as the said Court shall allow, (not exceeding one year, to be computed from the date aforesaid); such Court of Review shall proceed to hear and decide on the said petition; or, at the option of the said bankrupt, and on his finding such security for costs, (if the said Court shall think fit to require any security,) as by the said Court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication by a jury, to be duly impannelled and sworn for that purpose, before the Chief Judge, or any one or more of the other Judges of the Court of Bankruptcy." Now the adjudication under this commission took place on the 20th November 1831, and the petition was not presented till the 24th February following; which was more than two calendar months from the date of the adjudication. [*Sir J. Cross.* The clause

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may take away the power of the bankrupt to demand an issue; but does it take away the general jurisdiction of the Court? *Sir G. Rose.* There are no words in the new act, which deprive the bankrupt of the right he had before to supersede the commission; but only limit his right to demand an issue. *Sir A. Pell.* These two months, as mentioned in the 17th section, must mean two months after the act began to operate, which was on the 11th January 1832. *Erskine*, C. J. Do you mean to argue, that the bankrupt had no right to come here after the expiration of two months from the adjudication?] If the section is to be construed as applying only to prospective adjudications, then, in order to get rid of one difficulty, you get into another; for, according to that construction, you must deprive all persons, who have become bankrupt before the 11th January, of the benefit of the act. But the 2d section of the act, which gives the Court jurisdiction in bankruptcy, contains these words: "except as is herein otherwise provided;" therefore the general jurisdiction of the Court is limited by any subsequent provision. The words of the 17th section are, "if any trader *adjudged* bankrupt shall be minded to dispute such adjudication," not any trader who *shall be adjudged.* These words, therefore, cannot be considered to be prospective, as to the adjudication. [*Sir J. Cross.* The petitioner here does not pray a reversal of the adjudication, but that the commission may be superseded.] That appears to be in effect the same thing. [*Sir J. Cross.* The clause provides a new form of proceeding, namely, the *reversal of the adjudication;* and that seems to be a material point to be considered.] The petition states, that the bankrupt has not committed an act of bankruptcy; and

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if that allegation can be established, then that would defeat the adjudication.

Mr. *Montagu*, for the petitioner, was stopped by the Court.

ERSKINE, C. J.—My opinion is, that the objection raised to the hearing of this petition is not a valid one. There are no words in the 17th section of the act, which limit the general authority given to the Court by the 2d section. The intent of the 17th section was not to curtail the jurisdiction previously given, but to confer on the bankrupt a privilege which he did not possess before, namely, that of demanding an issue. The argument goes to this extent,—that the bankrupt could not come here for a reversal of the adjudication, on any ground whatever, after the expiration of the two calendar months. Now, when the 17th section declares, that the bankrupt may come at any time within the two months to pray a reversal of the adjudication, this indulgence seems to me not to interfere with the general jurisdiction of the Court to supersede a commission, whenever it shall think proper.

Sir A. PELL.—I think the 17th section the most important section of the act. I shall confine myself to the question,—whether this Court is restrained from hearing a petition to supersede a commission issued before the passing of the act, because the petition is presented more than two calendar months from the date of the adjudication. Now, to support the construction contended for by the counsel who have raised this objection, namely, that the 17th section is retrospective in

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its operation, it must be also contended, that if any one day of the two calendar months occurred after the commencement of the act, no petition could in that case be presented by the bankrupt to supersede a commission, or reverse an adjudication. But I think there must be a period of two clear calendar months, during which it was intended by the act to give the bankrupt an opportunity of presenting his petition; and therefore this period must necessarily commence after the act began to operate. Where it is intended, in other clauses of the statute, to extend the period before the passing of the act, there are words to that effect.

Sir J. CROSS.—This is not a petition for the *reversal of the adjudication,* and that, in my opinion, is enough to answer the objection.

Sir G. ROSE.—There does not appear to me to be the least foundation for this objection. Before the Bankruptcy Court Act, the bankrupt might at any time have presented his petition to supersede the commission, without any restriction whatever. Then, are there any words in the 17th section to limit the jurisdiction of this Court? I think that clause does nothing more than give a benefit to the bankrupt, without excluding the general jurisdiction of the Court given by the 2d section. Let us see how the bankrupt stood before this act came into operation. The bankrupt was then driven to an action at the peril of all the costs; for an issue was only given at the discretion of the Court. The section in question provides that the adjudication shall fall to the ground, if he presents his petition within two calendar months from the date of the adju-

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dication; and the intention of the act, as declared in the preamble, is, "that the rights, as well of the bankrupts themselves, as of their creditors, may be enforced with little expense, delay, and uncertainty as possible." Now, where do we find any thing in the act that gives the bankrupt any rights, except in this particular section? I have no hesitation, therefore, in deciding, that the operation of this clause is merely to give the bankrupt a right which he did not possess before; and that the Court has jurisdiction to entertain this petition, though presented after two calendar months from the date of the adjudication.

The COURT then proceeded to hear the argument on the merits of the petition. There were various contradictory affidavits, as to the intent with which the bankrupt departed from his dwelling-house; one of the deponents (of the name of *Bishop*) stating, that before the bankrupt quitted home, he told him it was for the purpose of keeping out of the way of his creditors,—and the bankrupt himself swearing, that he merely left his house to advise with his attorney, who lived at a distant town, how he ought to act with respect to an execution, which a creditor had put into the bankrupt's house. But it appeared, that *Bishop* had made two affidavits, differing entirely from each other, in the statement of what the bankrupt said to him upon leaving home.

Mr. *Montagu*, therefore, in support of the petition, after commenting at some length on the discrepancies in the affidavits, suggested that the Court could not arrive at a satisfactory decision, unless it ordered *Bishop* to be examined *vivâ voce*.

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Mr. *Koe* and Mr. *Bethel* contrà. It is material in this case to inquire, whether the Court has a power, under all the circumstances, to examine the witness *vivâ voce*. The 38th section of the new statute (*a*) declares, "that the said Judges and Commissioners of the said Court of Bankruptcy shall, in all matters within their respective jurisdictions, have power to take the whole, or any part, of the evidence either *vivâ voce* on oath, *or* upon affidavits, &c., as the said Court may in any case direct, or as the Lord Chancallor may from time to time prescribe, by any general rule to be made by virtue of this act." It seems very doubtful, therefore, when the hearing of a petition has proceeded to a certain extent on affidavit, whether the Court has then any jurisdiction to order a *vivâ voce* examination. For the clause says, that it shall have power to take the evidence either *vivâ voce, or* upon affidavit; an alternative that would seem to apply to the whole matter of inquiry, or at least to that portion of it which the Court has already taken on affidavit, or *vivâ voce*. It is observable, also, that in this section it is declared that the *Judges and Commissioners* shall have power to take *vivâ voce* evidence; but in every other section of the act the *Judges* are denominated as the *Court of Review*. There is also another question to be considered, before the Court determines upon such a proceeding: and that is, what course the Court is to pursue, in order to procure that *vivâ voce* testimony. For the 4th section of the act merely empowers the Court to issue process to compel the attendance of witnesses, when an *issue* is directed. [*Erskine* C. J. If the Court orders the attendance of a witness, it will

(*a*) 1 & 2 *Will.* 4. c. 56.

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have the same power of enforcing his attendance as that possessed by the Court of Chancery.] But the first part of the fourth section only applies to *issues*, and therefore that power only relates to orders of attendance on the trial of issues. At any rate, however, it is in the discretion of the Court whether they will order a *vivâ voce* examination. And the bankrupt here was, before the issuing of the commission, in possession of all the facts sworn to by the witness who is required to be examined.

The COURT, however, decided that it had a clear authority given to it by the statute, to direct any witnesses to be examined *vivâ voce*, notwithstanding the petition had been partly heard on affidavit; that under the peculiar circumstances of this case justice could not be effectually done, without examining all the parties who had made affidavits, some of which were very suspicious; and that as it was open to the Court to direct an issue, or to examine the parties, and the latter mode was the least expensive proceeding, it was right that the Court should have all the parties before it.

Mr. *Koe* then applied to the Court to order the bankrupt to give security for costs, contending that under the provisions of the 17th section the Court had power to require such security.

ERSKINE C. J.—It does not appear to have been the practice, in directing an issue (*a*), to call for security

(*a*) It would seem, from the words of the 17th section, that the Court has *no power* to require security for costs, unless the bankrupt exercises the option (given him by that section) of demanding an *issue*.

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from the bankrupt. Then why should we now require this security, when we adopt the less expensive mode of proceeding? You may have a subpœna at the office, without any special order as to a particular witness; for when the Court gives general directions for the examination of parties, there is no occasion to make any special order.

Ex parte ————.

Southampton Buildings, March 22.

The 1 & 2 *W.* 4. c. 56. s. 27. does not require the certificate of the appointment of assignees to be registered, in order to protect them against subsequent purchasers of the bankrupt's freehold property without notice, unless the property is situate in a register county.

MR. *MONTAGU* applied to the Court, for directions as to the mode of enrolling a certificate of the appointment of assignees, under the (*a*) 27th section of the 1 & 2 *Will.* 4. c. 56. It appeared, that the commission had issued before the operation of the new act; but the

(*a*) The 27th section declares, "that where, according to any laws now in force, any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, enrolled, or recorded in any registry office in England, Wales, or Ireland, or in any registry office, court, or other place in Scotland, or any of the dominions, plantations, or colonies belonging to his majesty, then in every such case such certificate as hereafter is described of the appointment of an assignee or assignees shall be registered in the registry office, court, or place wherein such conveyance as last aforesaid would require to be registered, enrolled, or recorded; and the registry hereby directed shall have the like effect to all intents and purposes, as the registry, enrolment, or recording of such conveyance or assignment as last aforesaid would have had; and the title of any purchaser of any such property as last aforesaid for valuable consideration, without notice of the bankruptcy, who shall have duly registered, enrolled, or recorded his purchase deed previous to the registry hereby directed, shall not be invalidated by reason of such appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within the times following; (that is to say) as regards the United Kingdom of Great Britain and Ireland, within two months from the date of such appointment; and as regards all other places, within 12 months from the date thereof."

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appointment of assignees having taken place on the 24th January, which was after the act began to operate, there had been no bargain and sale executed by the Commissioners, notwithstanding the bankrupt had freehold property in Northamptonshire; that form of conveyance being dispensed with by the provisions of the new act. The question was, whether the certificate of the appointment of assignees,—which now by the 26th section vested the real estate of the bankrupt in the assignees, without any deed of conveyance,—was not to be inrolled in the same way that the bargain and sale was formerly inrolled. The 29th section of the act declares, that a certificate of the appointment of assignees, purporting to be under the seal of the Court of Bankruptcy, shall be received as evidence of such appointment in all courts and places whatsoever, without further proof. [*Sir A. Pell.* All that you want therefore is, the seal of the Court put to that certificate.] The officer had some scruple in doing this, without the directions of the Court; there being no evidence (as he intimated) before him, that the certificate was a genuine instrument.

Erskine C. J.—The difficulty of the officer of the Court was, I presume, how he was to construe the validity of a certificate made not by us or our officer, but by persons in the country acting under the authority of the Lord Chancellor. The period of two months, limited by the act for registering the certificate, is not intended to affect the validity of the title of the assignees, except so far as regards the priority of claim of subsequent purchasers for valuable consideration, without notice of the bankruptcy, who have duly regis-

tered their purchase deeds previous to the registry of the certificate. 1832.

Sir J. Cross—By the 64th section of the General Bankrupt Act (*a*) it is provided, that where the deed of conveyance from the Commissioners to the assignees of the bankrupt's lands in any plantation or colony belonging to his majesty would, according to the laws of any such plantation or colony, *require registration, enrolment, or recording*, the same shall be so registered, enrolled, or recorded. And the 27th section of the new act, adopting the same language, extends the registration to the certificate of the appointment of assignees, in cases only "where, according to any laws now in force, any conveyance or assignment of any real or personal property of the bankrupt would require to be registered." It appears to me, therefore, that this section only applies to a register county; and that as the property in this case is situate in Northamptonshire, there is no need whatever to register the certificate.

(*a*) 6 *Geo.* 4. c. 16.

Ex parte Matthew Dixon.—In the matter of Matthew Dixon.

Southampton Buildings, March 23.

Where the bankrupt, after attending the last meeting before the Commissioners, inadvertently absented himself without passing his last examination, the Court, on his petition, ordered a fresh meeting for that purpose, on payment of costs.

THIS was a petition of the bankrupt, praying that the Court would order the Commissioners to appoint a time and place for the bankrupt to attend them, to finish his last examination. The commission issued on the 22d December 1831; and the bankrupt was summoned to attend the Commissioners, for the purpose of

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surrendering himself and passing his last examination on the 9th and 10th January and the 14th February 1832; on the second of which meetings he duly surrendered himself to the commission, and attended also at all three meetings, for the purpose of assisting in adjusting the accounts of various creditors. At the last meeting, after remaining there some time without being called upon to enter on his final examination, it occurred to him that there were some things omitted in his accounts, which he feared he should not be able to explain; and, being ignorant of the offence he was committing, he absented himself from the meeting, and did not then or afterwards surrender himself to the Commissioners; who thereupon certified his default. The bankrupt swore, that since that time he had with the assistance of an accountant been enabled to make such a statement of his affairs, as would lead to a full and true discovery of all his estate and effects, and would, he conceived, be satisfactory to the Commissioners and his creditors.

Mr. *Duckworth*, in support of the petition, submitted, that as the bankrupt had been thus prevented from passing his last examination, without any wilful default on his part, the Court would, in accordance with the former practice of the Lord Chancellor, order the Commissioners to appoint a fresh meeting to take his examination, which they could not do without the special order of the Court; nor, as he conceived, would the Court make such order, but upon payment of costs.

Mr. *Parker* appearing to consent on the part of the assignees,

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The Court made the order as prayed, directing the Commissioners to enter upon the proceedings the reason which prevented the bankrupt from finishing his examination at the former meeting.

Ex parte William Evans.—In the matter of Robert Ford.

Southampton Buildings, March 23.

One of two assignees petitioned that his co-assignee, or the solicitor to the commission, (one of whom had the custody of the proceedings,) might inrol them, pursuant to 6 *Geo.* 4. c. 16. s. 96. Held, that before he petitioned for this purpose, he ought first to have applied to the co-assignee, or solicitor, to produce the proceedings at the Office for Inrolment.

THE petitioner in this case was one of the assignees of the bankrupt. It appeared, that the commission issued on the 22d September 1825, and that a creditor of the name of *Gibbs* was chosen assignee; but, being a person of very infirm health, it was deemed advisable to appoint another person to become assignee conjointly with him. There being some difficulty in procuring any one to accept the appointment, *Gibbs* applied to the petitioner, who was not a creditor of the bankrupt; but, upon the persuasion and at the request of *Gibbs*, he consented to become such joint assignee, on condition that he should be indemnified from all the costs and expenses of working the commission; and the petitioner was accordingly appointed joint assignee with *Gibbs*. The estate of the bankrupt not producing sufficient to pay the expense of the commission and proceedings, the solicitor to the commission, one *J. F. Reeves*, commenced an action at law against *Gibbs* and the petitioner, to recover the amount of his bill of costs for working the commission; and the petitioner, in consequence thereof, was compelled to pay a large sum of money to *Reeves*. The petitioner therefore sought to recover from *Gibbs* the amount of what he was thus

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obliged to pay to *Reeves;* and for that purpose had commenced an action at law against him, in which notice of trial had been given for the next Somerset assizes, to be held at Taunton on the 29th March instant. In support of this action, the petitioner was advised that it was necessary the commission and proceedings should be entered of record, pursuant to the 6 *Geo.* 4. c. 16. s. 96. Neither the commission, nor any of the proceedings under it, were in the possession of the petitioner; but the petitioner believed they were either in the custody or power of *Gibbs,* or of *Reeves.*

The petitioner therefore prayed, that either *Gibbs,* or *Reeves,* might be ordered within three days to cause the commission and proceedings to be entered of record, pursuant to the provisions of the statute above mentioned.

Mr. *Chandless,* for the petitioner, stated that *Gibbs* had been already required to inrol the proceedings, but that he refused. A summons also had been taken out before Lord *Tenterden* for this purpose; but his lordship thought that he had no authority to order the proceedings to be inrolled. The petition had been served on *Gibbs,* as well as on *Reeves;* so that each had received sufficient notice of the present application.

Mr. *Montagu* appeared for *Gibbs,* the other assignee, to oppose the petition. By the terms of the 96th section of the 6 *Geo.* 4. c. 16., which directs that no commission of bankruptcy, adjudication, assignment, or certificate, shall be received as evidence, unless entered of record, it is expressly declared, " that every such in-

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strument shall be so entered of record, upon the application of, or on behalf of, any party interested therein, and on payment of the several fees aforesaid, *without any petition in writing presented for that purpose.*" Before this party, therefore, came here upon petition, why did he not make an application at the proper office to register these proceedings? But, independently of this objection, the intention of the legislature, in making this enactment, was to support the rights of assignees against third persons, and not to interfere in the disputes of assignees between themselves.

Erskine, C. J. Has the petitioner ever applied to *Gibbs*, or to *Reeves*, to produce the proceedings at the office for inrolment?

Mr. *Montagu*. Nothing of the kind appears. I shall therefore oppose the prayer of this petition, until the other side prove that they have made such an application, or that the officer of the Court refused to inrol the proceedings, before they brought us here.

Sir A. Pell.—My opinion is, that the judge at the trial would permit secondary evidence of these proceedings to be given, if you refuse to inrol them.

Sir G. Rose.—As this is an adverse application of one assignee against another, and the petitioner comes here for his own particular interest, and not for that of the bankrupt's estate, he must pay the costs of this application.

Sir A. Pell.—If there had been a distinct refusal by *Gibbs*, or *Reeves*, to produce the proceedings at the

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office, then I think the party who so refused ought to have paid the costs.

Petition dismissed with costs.

Ex parte Fletcher.—In the matter of Collins and Prior.

Southampton Buildings, March 23.

From the 10th to the 23d March, is a reasonable time for assignees to elect, whether they will accept or reject the bankrupt's lease.

THIS petition, which was by an equitable mortgagee, for the sale of leasehold property, had stood over from the 10th March (*a*), in order that the assignees might have time to elect whether they would accept or reject the lease; but it appeared, that they had not yet come to any determination on that subject.

Mr. *G. Richards,* for the petitioner, applied therefore for the usual order.

Mr. *Spurrier,* for the assignees, submitted, that as the assignees had not yet made their election, the order should be postponed.

The Court, however, thought that the assignees had had a reasonable time to come to a decision on this matter, and granted the usual order; *Sir G. Rose* observing, that if the assignees chose to have the conduct of the sale, they might; but if they declined, then the equitable mortgagee might conduct it.

The order was accordingly made in the alternative.

(*a*) See *ante,* p. 318.

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Southampton Buildings, March 26.

Where a bankrupt trustee had suffered the trust fund to be misappropriated, the Court directed that the son of the *cestui que trust* might prove for the amount, retaining the dividends till further order.

Ex parte VINE.—In the matter of HOOPER.

THIS was the petition of a *cestui que trust*, praying, that her son might be appointed to prove on her behalf against the estate of the bankrupt trustee, and that the costs of the application might be paid out of the estate. It appeared, that a sum of 385*l.* had been bequeathed to the petitioner by a relative, and that (pursuant to the directions of the will) it had been invested in the funds in the name of the bankrupt, as trustee for the petitioner. At the time of his bankruptcy, in July 1831, it was discovered that this fund had been sold out by the bankrupt's agent under a power of attorney, but which the bankrupt stated he had never executed.

Mr. *Bacon*, for the petitioner, urged that the Court would under these circumstances direct, that some proper person should be appointed a trustee for the petitioner, and that the dividends should be paid to him, and invested by him under the trusts of the will.

Mr. *Montagu*, for the assignees, had no objection to a person being appointed to prove for the petitioner; but contended, that if she wished to change her trustee, she could not do it under the prayer of this petition; that the petition was of great and unnecessary length; and that the bankrupt's estate ought not to be saddled with the costs of it, when one in ten lines would have answered the purpose as well.

The COURT said, that all it could do for the petitioner was, to appoint her son to prove for her under the commission, and to direct the dividends to be re-

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Ex parte VINE.

tained till further order, each party paying their own costs.

Mr. *Montagu* said, that he did not know how the assignees would get the costs of appearing from the estate.

ERSKINE, C. J.—The petition has been rendered necessary by the misconduct of the bankrupt, in thus suffering trust monies to be misappropriated (*a*).

(*a*) And see *Ex parte Page*, *ante*, 321.

Ex parte HOWELL.—In the matter of STODDART.
Ex parte TIMBRELL.—In the same matter.

Southampton Buildings, March 27.

When the Court is not satisfied as to the facts sworn to in affidavits, it will order the deponent to be examined *vivâ voce*.

THE petition in each of these cases was to restore the proof of a debt, which the Commissioners had expunged, on the ground that the debts of both petitioners were barred by the statute of limitations. The proof in each case was made on bills of exchange, dated so far back as the year 1824; and the only question to be decided was one of fact, namely, whether there was any payment of interest, or admission *in writing* (*b*), by the bankrupt, so as to prevent the operation of the statute. The petitioners had made affidavits of these matters; but the Court, not being satisfied as to the facts deposed to, directed the petitioners to be brought before it, to be examined as to the truth of their affidavits, pursuant to the power given it by the recent statute of 1 & 2

(*b*) See the recent statute of 9 *Geo.* 4. c. 14., and the cases subsequently determined on its enactments, of *Ansell* v. *Ansell*, 3 Car. & P. 563; *id.* 564, note; *Towler* v. *Chatterton*, 6 Bing. 258; and *Haydon* v. *Williams*, 7 Bing. 163.

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Ex parte HOWELL. Ex parte TIMBRELL.

W. 4. c. 56. s. 38. (*a*) It appeared from the letters of the bankrupt, which were produced by the parties under examination, that he had admitted having made payments of interest on the bills down to 1829; upon which the Court ordered the proofs to be restored. The cases are merely noticed in this place, as being those in which the *first vivâ voce* examination occurred in practice under the provisions of the new act. And it may be also not unworthy of remark, that what had not been satisfactorily made out in four different affidavits of the petitioner *Howell*, was at once cleared up by his examination.

(*a*) And see *Ex parte Palmer*, *ante*, p. 341.

ANONYMOUS.

March 27.

The Court of Review has no direct power over the Secretary of Bankrupts, who is an officer of the Lord Chancellor, and not of this Court.

AN application was made, that the Court would order the Secretary of Bankrupts to attend before a grand jury in the country on an indictment for perjury, with an original petition in a matter of bankruptcy, which had been presented to the Lord Chancellor previous to the existence of this Court; the production of the petition being necessary, in order to substantiate the allegations in the indictment.

The COURT intimated, that they had no power over the Secretary of Bankrupts, and that the Lord Chancellor was the proper person to apply to, on an occasion of this kind. All that the Court could say was, that the Secretary *was at liberty* to attend, according to the wish of the parties (*b*).

(*b*) And see *Re Fly*, *ante*, p. 249. It seems, however, that the most regular mode of compelling the attendance of a public officer with any documents in support of an indictment,—a proceeding in which the King is a party,—is to serve him with a *subpœna duces tecum* sued out of the Crown Office. 1 Chit. C. L. 608. 1 Deac. Crim. Dig. 419.

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Southampton Buildings, March 28.

The Court will make no order for proof of a debt, in anticipation of a probable objection that may be made to such proof by the Commissioner. When any application of this nature is made previous to the choice of assignees, the petitioning creditor should be served with the petition.

Ex parte BARBER BEAUMONT.—In the matter of Sir GEORGE DUCKETT, Sir F. MORLAND, and Company.

MR. *N. Ellison,* for the petitioner, applied, in the *first* instance, that the petition might be answered as for this day; which the Court granted accordingly.

He then stated the nature of the petition, (which was one *ex parte,*) and the prayer of which was, that the petitioner might be admitted to prove a debt on behalf of the County Fire Office, under the following circumstances:—Sir *G. Duckett* was the holder of five shares in that office, and Sir *F. Morland* was the holder of five more, and also (as administrator of his father) of six other shares; and Sir *G. Duckett, Morland* & Co. were the bankers of the County Fire Office. A *fiat* had issued against *Duckett* & Co. a few days back, and a meeting of creditors was appointed to take place on the 5th April next, for the purpose of proving debts, and voting in the choice of assignees. The bankrupts were indebted to the Insurance Company to the amount of about 13,000*l.*; but the managing directors were apprehensive, as Sir *G. Duckett* and Sir *F. Morland* were partners and trustees in the Insurance Company, that the Commissioner might refuse to admit the proof by Mr. *Beaumont;* in which case the company, although preponderating creditors, would be excluded from the choice of assignees.

The COURT however determined, that the circumstances, as stated, afforded no sufficient reason why the petitioner should come here, in anticipation of the Commissioner objecting to the proof; and that it would be

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Ex parte BEAUMONT and another.

quite time enough to apply to the Court for redress, when the petitioner was injured by the actual rejection of it; but that at all events, as the case was then presented for consideration, the Court could not make any order, without having the petitioning creditor before it; and that he must therefore be served with the petition, to enable him to meet this application.

Ex parte PETER HEALEY and ANN POSTLES.—In the matter of THOMAS NORRIS.

A surviving assignee is liable for the payment of dividends, if his co-assignee ever admitted the proof of the debt, although the creditor has failed to apply for the dividends for many years; unless it can be proved that the creditor has received them,—the onus of the proof of payment lying on the assignee; and this, notwithstanding there is no sufficient fund left of the bankrupt's estate to pay the creditor.

The statute of limitations does not attach to a debt proved under a commission or fiat of bankruptcy.

THIS was a petition of the surviving executors of a creditor, against the surviving assignee of the bankrupt, for the payment of a dividend.

The petition stated, that the commission issued in January 1812, and that *Anthony Rowlandson* and *John Douglas* were chosen assignees. That *John Postles* was in his life-time admitted to prove a debt of 120*l.* 4*s.* 5¼*d.* under the commission. That in May 1813 and April 1814 two dividends were made, amounting together to 5*s.* in the pound; which on the testator's debt of 120*l.* 4*s.* 5¼*d.* amounted to 30*l.* 4*s.* 8¼*d.* That *Postles* died in December 1814, without having received either of these dividends, having by his will appointed the petitioners, together with *John Weston* and *William England,* his executrix and executors; and the petitioners and *John Weston* proved the will. That *Healey* was the sole acting executor, *Weston* and *England* having been long since dead. That *Healey* had made repeated applications to *Rowlandson* and *Douglas* for payment of the dividends, which they had hitherto

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neglected to comply with; and that *Rowlandson* died some time ago, leaving *Douglas* the surviving assignee.

The prayer was, that the Court would order *Douglas*, the surviving assignee, to pay forthwith to the petitioner *Healey* the amount of the dividends, with interest thereon at the rate of *5l. per cent. per annum*, for the time that the dividends had been withheld, together with the costs of the application.

The petition was supported by an affidavit of *Healey*, stating, that some time after the death of *Postles*, the deponent was informed by a Mr. *Gell*, the book-keeper of *Postles*, that *Postles* had in his lifetime proved under the commission a debt of 120*l.* 4*s.* 5¼*d.*, and that a dividend had been declared thereon. That in the year 1815 or 1816 the deponent, being in London on other business, called on *Rowlandson* and requested payment; and that *Rowlandson* admitted the debt had been proved, but declined paying the dividend, because the deponent had not then with him the probate of the will of *John Postles*. That the deponent in 1816 or 1817, being again in London, made another application to *Rowlandson* for payment of the dividends, and produced the probate; but payment was then declined, because the bill of exchange, referred to by *Postles'* deposition at the time of proving, was not also produced. That deponent, after having made diligent inquiries for the bill in question, without finding it, called on one or more subsequent occasions (but in what particular year or years he could not recollect) upon Mr. *Rowlandson*, who persisted in his refusal to pay the dividends, without the production of the bill; which bill, the deponent swore he believed, was duly exhibited with the affidavit in support of the debt at the time of

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proof, and was still remaining on the file of the proceedings attached to the affidavit. The deponent admitted that he was since occasionally in London, but his engagements rendered it inconvenient to him to repeat his applications for the dividends; and thus the matter entirely escaped his recollection for many years. In July 1830, however, the deponent having, whilst looking over some papers belonging to his executorship accounts with *Postles*' estate, accidentally laid his hand upon a memorandum relating to the debt,—which had been some time previously furnished him by Mr. *Gell*, the book-keeper of *Postles*,—called forthwith at Mr. *Rowlandson*'s office; but found that Mr. *Rowlandson* was dead, and that *Douglas* was the only surviving assignee of the bankrupt's estate. He therefore caused immediate application to be made to *Douglas* for the dividends, but without effect.

In answer to this petition, *Douglas* the co-assignee stated on affidavit, that he had never acted as assignee, but that the whole duties had devolved upon *Rowlandson*, who alone had the possession of the bankrupt's books, and the direction and payment of all monies under the commission. That he was unable to ascertain whether any debt was ever proved by *Postles*, but that deponent had never been applied to for payment of any dividend, until the claim recently made by the petitioner; and that he believed, if a debt had been duly proved by *Postles*, *Rowlandson* would have paid him the dividends thereon, as he did all the other creditors of the bankrupt. That until about 18 months since, (being 14 or 15 years after the dividends had been declared, and after the bankrupt and *Rowlandson* had died,) no application was made to the deponent by

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the petitioner, nor did the deponent receive any intimation of his claim. That upon such application being made, he applied to Mr. *Lowe*, the surviving solicitor under the commission, for the proceedings, to enable him to satisfy himself whether such debt had been proved, and, if proved, whether any dividend had been paid thereon; but Mr. *Lowe*'s answers were, that after diligent search made the proceedings could not be found. That there was no balance remaining to the credit of the assignees in the banker's hands; and therefore, if any sum was ordered to be paid by the deponent, it would be out of his own monies.

Mr. *Montagu*, in support of the petition, contended, that under the 111th section of the 6 *Geo.* 4. c. 16., the assignee was liable to the payment of the dividend now claimed, with *5l.* per cent. interest; and he cited *Ex parte Loxley* (*a*). The answers of *Rowlandson* to the several applications made to him for payment, amounted to an admission, on his part, that the debt had been proved; a fact, which he (having been the acting assignee) must have had knowledge of, one way or the other. Assignees are bound to keep the proceedings in the bankruptcy, and by means of them ought to be in a situation to show to the Court, whether the debt has been proved or paid. If an assignee has suffered them to be lost, he must be bound by the consequences, and cannot be allowed to urge the neglect of his duty, in not safely keeping them, as an excuse for the non-payment of a dividend; which after it is declared is, *primâ facie*, due to a creditor who has proved his debt under the commission.

(*a*) 1 G. & J. 345.

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Mr. *G. Richards*, for *Douglas* the surviving assignee, contended, that every probability existed of the debt having been long since paid. With respect to the dividends, seventeen years had now elapsed since the alleged proof; and as the creditor *Postles* was living for some considerable time after the declaration of the dividends, it was to be presumed that he had received them during his lifetime. With respect to the alleged mode of proving payment, by the production of the proceedings,—nothing could arise from them, if they were produced; since the bankruptcy took place during the operation of the 49 *Geo.* 3. c. 121.; and there was no necessity for assignees to keep the accounts of the estate in books, until the 6 *Geo.* 4. c. 16. s. 101.

ERSKINE, C.J.—Although no book of accounts might be requisite till the 6 *Geo.* 4. c. 16. (*a*), yet it is not to be supposed that the assignees would pay a dividend, or any other money, without requiring some receipt or acknowledgment from the creditor that he had been paid. I think, too, that the assignees are bound to show by evidence, whether the debt has been proved, or not. They ought to have the proceedings in their hands; and the production of these would at once set that difficulty at rest. But the presumption arising from *Rowlandson*'s answers to applications for payment of the dividend, in the absence of all evidence that might be obtained by the production of the proceedings, is certainly sufficient to justify us in saying, that the debt has been proved. The next question is, if the divi-

(*a*) The assignees were required by the 5 *Geo.* 2. c. 30. s. 26. to keep an account of receipts and payments, but the Commissioners could not compel them to produce it till the 6 *Geo.* 4. c. 16.

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dends have ever been received. The onus of proof, in this instance, is assuredly on the party affirming the fact of payment Now, in order to prove this fact, what has this respondent done? He has omitted the very inquiry, that might have furnished the requisite evidence; namely, the search among the papers of his late co-assignee. With respect to the want of application on the part of *Postles*, or the petitioner, to the respondent, I think there is no force in that objection; as there is nothing in the affidavits to show that either *Postles*, or *Healey*, knew any thing of *Douglas* being co-assignee until a very late period, namely, July or August 1830. I am therefore of opinion, that the prayer of the petition ought to be granted; but I do not think we ought to allow the demand against *Douglas* to be carried further back than the year 1830.

Sir A. PELL.—I am of the same opinion. What strikes my mind very forcibly is, that though the proceedings are said to be lost, yet Mr. *Lowe* (who is stated to be the last person in possession of them) has not ventured, or perhaps has not been called upon, to make any affidavit whatever of the fact. In order to prove the allegation of payment, the respondent certainly might have applied to the executors of Mr. *Rowlandson*, to cause a search to be made for any document that might establish that fact. The respondent has not used sufficient diligence, to convince me that payment has been made; and, without such due diligence, it does not seem to me reasonable that we should presume it; for presumption should never be made in favour of a party, who might with proper diligence produce positive facts, that would speak for themselves. The petitioner has

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certainly not been so active in requiring payment, as he might have been, and (I have no doubt) would have been, had he been himself the creditor; but, being a mere executor, he suffers the claim to slumber till his attention is recalled to it; which, however reprehensible *per se,* is not sufficient to debar his *cestui que trusts* of their rights. The assignees are always bound to be ready with proof of every proceeding under the commission; and the mere lapse of time is in this case no bar to the petitioner's claim; for I think *Rowlandson* has very manifestly admitted that the debt was proved under the commission, by his replies to *Healey*'s applications.

Sir J. CROSS.—I am sorry to say, that I cannot bring my mind to concur in the opinions expressed by my learned colleagues, who have preceded me. For I think, after the lapse of time that has occurred since this bankruptcy, a party claiming under it ought to have established his claim much more satisfactorily than the petitioner has done. I think the Court ought in such a case to take the probabilities into their consideration, in the same manner as a jury would be directed to do by a judge presiding in a common law court. Now, presuming even that proof of the debt had been made, the original creditor survived the declarations of the dividends for a very considerable time. The first was declared in May 1813, and the second in April 1814; and the original creditor did not die till December 1814. Is it not then reasonable to presume, that during the interval between the last declaration of dividend and the death, a period of eight months, *Postles* had received his dividends? Is it likely

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that he would not, within a few days after the declaration of each dividend, go to the assignees and receive it? But *Postles* dies, and appoints executors, the acting one being the petitioner, who is an attorney; and no steps are taken by him till the present moment to recover the money,—which is actually in *Rowlandson*'s hands from the year 1814 until his death,—except the loose and scattered applications to *Rowlandson* in the years 1815 *or* 1816, and 1816 *or* 1817, as mentioned in the affidavit, and those in 1830, and since, to the respondent *Douglas*; a species of neglect, which,—considering the petitioner to be an attorney, and a man of business, and therefore one not very likely to suffer a valid claim to slumber,—in my mind, amounts to a consciousness on his part that there was no real foundation for the claim. At law, this demand would beyond all doubt be presumed to have been paid; for, after twenty years, the presumption is that even a bond is satisfied. The present claimant, however, who is admitted to be an attorney, is nevertheless supposed to slumber on and forget his rights for fourteen years. But might he not as likely have forgotten, that payment had been actually made to him? After such gross neglect, I think, at any rate, the *onus probandi* to support his claim rests on himself; and that he ought to satisfy the Court, in a better way than he has done to my mind, that the debt is still really due, before we compel an innocent assignee, who has never meddled with the estate, to pay the dividends claimed by the petitioner. As to the neglect of *Douglas*, in trusting implicitly to his co-assignee *Rowlandson*, I think the petitioner has been guilty of greater neglect, in having omitted for so long a time down to 1830 to make any application on the subject to

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Douglas; and this appears to me quite sufficient ground to exonerate him from payment.

Sir G. ROSE.—I concur with the majority of the Court, and think the only question here is, from what time *Douglas* shall be chargeable with interest at five per cent. The statute of limitations in no manner attaches to a debt once proved under the commission(*a*). The state of the law on this subject rendered it unnecessary to have recourse to any presumption of payment applicable to mercantile accounts; for it was always considered, that bankruptcy renders a debt, when proved, a solemn continuing legal demand, against which time will not run. The assignees stand in the same relation to the creditors, as trustees do to their *cestui que trusts;* and cannot avail themselves of any lapse of time, in answer to a demand by a creditor, in respect of a debt proved by him under the commission.

The COURT, therefore, ordered the respondent to pay the dividend with interest for eighteen months at five per cent., together with the costs of the application.

(*a*) And see the case of *Ex parte Ross*, 2 G. & J. 46. *S. C.* on appeal, ibid. 330.

Ex parte BEARDSWORTH.—In the matter of JONES.

March 28.

Period of eight days, for which a petition was answered, allowed to be enlarged.

MR. *KOE* applied that the period of eight days, which is the usual time allowed for the parties to attend after presenting a petition (*b*), might in this case be

(*b*) See the General Order, Appendix, lvii.

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enlarged, the parties being detained on business in the country.

The COURT granted the application, directing that the affidavits in support of the petition should be filed in proper time: and observing, that it was a matter of course *to enlarge* the period for which a petition is answered,—but that in order to lessen it, a special application was necessary.

END OF HILARY TERM.

CASES

IN

EASTER TERM, 1832.

IN THE

SECOND YEAR OF THE REIGN OF WILLIAM IV.

Ex parte PALMER.—In the matter of PALMER.

Westminster, April 17.

Course of proceeding, and rules of evidence, on a *vivâ voce* examination on a bankrupt's petition to supersede.

THIS was the petition of a bankrupt to supersede his commission, upon the ground that no act of bankruptcy had been committed by him. It first came before the Court on the 22d March, when a preliminary objection was disposed of as to the power of the Court to hear the petition (*a*); and it stood over till this day, for the purpose of examining some of the witnesses *vivâ voce*, who had already made affidavits. The bankrupt, it appeared, had carried on the business of a hardware manufacturer at Bath. On the 10th of November 1831 an execution was levied on his goods, and *Bishop*, a bailiff's follower, was put into possession on the premises where the bankrupt was then residing. According to the affidavit of *Bishop*, the bankrupt, on the evening of the 17th November, after attempting to consult *Bishop* upon the state of his affairs, and as to what he had best do, stated his intention to leave Bath in order to avoid his creditors; and he accordingly

(*a*) See *ante*, p. 341.

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went to Newbury, a distance of 50 miles from his residence; this departure constituting the act of bankruptcy on which the commission was founded. It was to enable the Court to decide, whether the bankrupt's real intent was to delay his creditors, in thus leaving Bath, that the Judges thought it necessary to have parol testimony of some of the facts, which were very obscure on the affidavits. There were several witnesses accordingly brought up this day before the Court, for the purpose of being examined, when the following questions arose on the law and practice of evidence.

Mr. *Montagu* and Mr. *Kindersley* conducted the examination on the part of the petitioner.

Mr. *Koe* and Mr. *Bethell*, for the assignees.

A doubt first arose as to who should call *Bishop*, who was the principal witness to prove the act of bankruptcy, and who had made two contradictory depositions before the Commissioners.

The party, on whom the affirmative of an issue lies, must call the witness who proves that affirmative.

Sir A. PELL.—I think it is the duty of the counsel for the assignees to call the witness; *first*, because of the discrepancy in his depositions, which it is the part of the assignees to explain; and, *secondly*, because the proof of the affirmative of this issue, namely, that there was an act of bankruptcy, also rests with the assignees.

The witness was accordingly examined in chief by Mr. *Koe*, on the part of the assignees.

In his cross-examination Mr. *Montagu* proceeded to put several questions to him relative to the transactions of his previous life, but irrelevant to the point in issue.

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Per Curiam.—If the questions are asked with the view of contradicting the witness by other evidence, the questions must be on relevant points, and not on matters wholly foreign to the issue (*a*). The answers of the witness, therefore, to the questions that have been put to him must be taken for better and for worse.

A witness cannot be cross-examined for the purpose of contradicting him, except on points relevant to the issue.

A witness was afterwards called by Mr. *Montagu* to prove, amongst other things, the conversation of the bankrupt at the time of his quitting his house, in order to explain his motives for so doing.

Sir A. PELL.—What the bankrupt says as to his going away must, in order to be available, be accompanying the act of his departure, or be so near to it as to lead one to consider it as part of the act. The time must be so coupled with the act, as to form a part of the *res gestæ*.

In order to let in the declarations of the bankrupt, in proving an act of bankruptcy, what the bankrupt says must be connected or cotemporaneous with the act.

Another witness was called, as to the conduct of the bankrupt at Newbury, after his departure from his dwelling-house; and Mr. *Montagu* was proceeding to examine him, as to a conversation he had had *there* with the bankrupt concerning his motives for leaving Bath.

Sir A. PELL.—Conversations during the bankrupt's absence from his home, and not at the time of his departure, cannot be received in evidence.

The following question was then put by Mr. *Montagu*,

(*a*) And see *Spenceley* v. *De Willott*, 7 East, 108; *Harris* v. *Tippett*, 2 Campb. 637.

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"Did you, on the 19th November (*a*), have any conversation with the bankrupt on the state of his affairs?" On the question being objected to, he relied on the case of *Bateman* v. *Bailey* (*b*).

ERSKINE, C. J.—Every conversation, that tends to show the intent of his *continuing to absent himself*, which is a distinct act of bankruptcy, may, I think, be received in evidence.

Sir A. PELL.—What a trader says and does, subsequent to the act of bankruptcy, does not appear to me to be evidence. It would open the door to great inconvenience and fraud, indeed, if the declarations of a trader, who had committed an act of bankruptcy by departing from his dwelling-house, could be admitted in evidence to destroy such act of bankruptcy. The case of *Bateman* v. *Bailey* relates to what was said by the bankrupt on his return to his dwelling-house. But even that case has been very much doubted. It is a solitary case, and has, I think, been overruled. What the bankrupt said when he left the house, is admissible, as part of the *res gestæ*, to prove the intent of his leaving; but that must be shown to be so near the act of departure, as to form a part of the proceeding. There is a direct authority, where Lord *Ellenborough* held, that what a bankrupt said, which did not appear to be either contemporary with the act of absenting, or immediately subsequent to it, was inadmissible (*c*). The correctness of the decision in *Bateman* v. *Bailey* is therefore much to be doubted; and I, for one, think such declarations ought not to be admitted.

(*a*) This was after the bankrupt had arrived at Newbury.

(*b*) 5 T. R. 512. (*c*) See the case of *Marsh* v. *Meager*, 1 Star. 353

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Sir J. CROSS.—My opinion is, that the objection is altogether premature. The departure from his house, and the absenting himself, are all one question; and the Court can best judge of the intent, by inquiry into the motives which the bankrupt assigned for his absence; as, for instance, if he held a conversation touching any particular motive. I think, so far as the mere question goes, it is perfectly competent to be put; but the moment a fact comes out, then it assumes another shape.

Sir G. ROSE.—The question really is, how far the declaration of the bankrupt is so connected with his act, as to be admissible in evidence. It is altogether inadmissible, unless it be connected. The question here arises, not merely on his departure on the 17th November, but by *continuing* to *absent himself*. There is a case, where letters written while the party was abroad were admitted in evidence, to construe the intent of his departing the realm. I allude to the case of *Rawson* v. *Haigh* (*a*). I think it is preposterous to say, that the declarations of the bankrupt, when he is absent, are not in this case admissible. How far they may affect and be referable to his departure, is quite another matter.

Mr. *Montagu* next proposed to call and examine the bankrupt himself.

The Court of Review has power to examine the bankrupt *vivâ voce*, on his petition to supersede the commission.

Mr. *Koe* objected, that the bankrupt was an incompetent witness; for this was, in effect, his own cause. Upon the petition of a bankrupt to supersede his com-

(*a*) 2 Bing. 99.

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mission, it surely is not competent for him to say, "I did not commit an act of bankruptcy." Besides which, he is not our witness, and the other side can only examine the witnesses we call. The bankrupt has already been examined before the commissioners, and has also made an affidavit; and therefore this appears to be a very curious and anomalous state of things. We are proceeding partly by affidavit, and partly by *vivâ voce* examination.

Sir J. CROSS.—The question is, not whether he is a good witness in an action, but whether he is a good witness here upon the present petition.

Sir G. ROSE.—It is in every day's practice, that when an issue is granted to try the bankruptcy, the Court of common law is directed to examine the bankrupt. The rule is, to direct all parties to be examined who have made affidavits under the commission. This Court, I take it to be clear, would have had power to order him to be examined, had it directed an issue to try the fact, instead of taking upon itself to examine the parties. This, to all intents and purposes, is an issue, whether there is or is not a valid commission. The bankrupt is not in this instance the witness of either party. The Court has power, by the 30th section of the Bankruptcy Court Act, to take evidence *vivâ voce;* for that purpose we call the bankrupt before us, and he is in fact the witness of the Court.

Sir A. PELL.—Many cases have occurred, where a Court of equity,—after directing the examination of a particular party in a proceeding at law, who has not

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been examined,—has sent the case back to the Court of common law, for the express purpose of examining the party. As to the objection, that the bankrupt is an incompetent witness, because he has filed an affidavit, I think it is absurd; for a man would then only have to be persuaded to file an affidavit in any matter pending before this Court, in order to disqualify him as a witness. I remember in *Howard* and *Gibbs*'s case, there was an express order that *Gibbs* himself should be examined.

Sir G. ROSE.—The rule of evidence is not interfered with, by admitting in this case the testimony of the bankrupt. There are many modes, in which the trial of an issue may be controlled. Sometimes all the parties are directed to be examined; sometimes a special direction is given, that a particular party, whether plaintiff or defendant, shall be examined; and this, as to his own affidavit, so that it may be seen whether he is entitled to any credit, or not. When the Court has thus directed an issue, and the examination of either of the parties, the witness then becomes the witness of the Court. The previous litigant parties are, in truth, not the parties in the issue. The issue is merely to satisfy the mind of the Court directing it; and thus it is, that creditors are often directed to be examined, though it is quite clear they would not be competent for that purpose, on the trial of an action. There is no dispute that the affidavit of the bankrupt is evidence in this case; and this he has sworn already. Therefore the sole question is, whether this Court has not the power to direct the bankrupt to be examined, notwithstanding he is not allowed at law to disprove his own bankruptcy?

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Erskine, C. J.—I have no doubt of the power of this Court. Supposing the Court of Chancery had directed an issue to be tried between *A.* and *B.*, could it not have directed the bankrupt to be examined? Then, what the Court of Chancery could have done in this respect, this Court can also do. The object of the examination is to satisfy the mind of the Court; and though it is a matter not obligatory on us, but altogether discretionary, whether we should examine the bankrupt, or not, yet I think it is right that we should exercise that power on the present occasion. There is no doubt that admitting a party as a witness in his own cause is, in general, highly objectionable; but it appears to me, that the advantage we shall derive from the bankrupt's testimony in this instance, receiving it as we shall do with proper caution, will greatly counterbalance the disadvantages, in the elucidation of the truth of the matter before us.

Sir A. Pell.—There are two questions here for our consideration. The *first* is, whether, under the act of parliament by which we are here assembled, we have power to examine the bankrupt. The *second* is, whether, having that power, we shall do right to exercise it in this instance. Touching our power,—I presume there is no dispute as to the admissibility of the bankrupt's affidavit; for, on the present occasion, no less than two have been filed and used, without objection. If then we may regulate our decision on the merits of a case, through the medium of the affidavit of the bankrupt, how much more reasonable is it, that we should decide, by the result of an examination of the party himself taken in Court before us. Of the power there-

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fore to examine the bankrupt, I have no doubt. I am well aware it may be said, that in doing so we are breaking into the fundamental rule of law, *nemo debet esse testis in propriâ causâ*. But there have been exceptions to this rule; and those exceptions have been more especially recognised in such cases as the present by successive Chancellors.

As to the exercise of this power in the present instance, I am more reluctant to give my judgment in its favour; because it is evident, that there is perjury, either on one side, or on the other. However, upon the whole, I think that the examination ought to be pursued.

Sir J. CROSS.—As to the power of this Court, I entertain no doubt. It has the same powers in bankruptcy which the Lord Chancellor had; and we here combine also the powers of law and equity, and can therefore bring to bear upon any question the functions of both. The words of the act in the 38th section, which give the Court power to take the whole, or any part of the evidence, either *vivâ voce* on oath, or upon affidavit, are "as the Court may in any case direct." These combined powers seem to me like those of an arbitrator, who, in the exercise of his power to examine either of the parties in the cause, ought not to do so without due deliberation and discretion. Now the question here is, is this man a bankrupt or not? What were his motives in going to Newbury? Motives, however, can only be judged of by external acts; and where a man is to be examined as to the motives of his own acts, his testimony should be watched with the greatest jealously, particulary in a case where he is a voluntary

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witness. The greatest caution ought also to be observed in producing him; for it is competent to the opposite party to put every kind of question to him. In my opinion, however, there is not in this case sufficient to call for the examination of the bankrupt; and I think it inexpedient that he should be examined.

Sir G. ROSE concurring with the majority of the Judges, in the opinion that the Court had not only the power, but that it was also expedient, to examine the bankrupt, the examination then proceeded.

A question afterwards arose, as to the course of proceeding to be pursued by the counsel for the petitioner, when the examination had concluded.

ERSKINE, C. J.—You should pursue the same course in reply, as if this had been heard simply by affidavit.

Ex parte SPRINGETT.—In the matter of SPRINGETT.

On a petition by creditors to supersede, if they are styled *creditors* in the title of the petition, there need be no express allegation to that effect.

THIS was the petition of certain creditors to supersede the commission, on the ground that the party was not a trader; but there was no direct allegation in the body of the petition, that the petitioners were *creditors* of the bankrupt. In the title, however, of the petition they were styled "*creditors*" of the bankrupt; and this was held sufficient to support their character of *creditors*, without any express allegation to that effect.

The other points arising out of this petition were mere matters of fact, as to whether the bankrupt was a

trader or not; which the Court decided on the hearing of the petition and the affidavits, without putting the parties to the expense of an issue before a jury (*a*).

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Ex parte SPRINGETT.

Mr. *Montagu* for the petitioners.

Mr. *Swanston* for the respondents.

In the matter of WALKER.

Westminster, April 25, 1832.

How a fiat may be amended.

IN this case a fiat had been issued against the bankrupt by a wrong Christian name, his real name being *Thomas Walker*, and he being described in the fiat as *John Walker*. The fiat had not been opened, nor had there been any proceedings under it.

Mr. *Montagu* applied under these circumstances for leave to strike a new docket, and amend the fiat by substituting the name of *Thomas* for that of *John*.

ERSKINE, C. J.—If the fiat has been filed, we can only order it to be taken off the file of this Court, for the purpose of the Lord Chancellor amending it, if he shall think fit. But this Court cannot make the order for the fiat to be amended; for we have nothing to amend by.

(*a*) The acts of trading relied on were the buying and selling sheep by the bankrupt, who was a farmer. It did not appear, however, that he was a general dealer in these animals, or that he bought them for the mere purpose of reselling them at a profit, but that he kept them some time as part of the stock on his farm before he sold them. The Court therefore decided, that he was not a trader within the bankrupt law, as these acts of buying and selling were only incidental to the occupation of his farm. And see *Bolton* v. *Sowerby*, 11 East, 274; *Wright* v. *Bird*, 1 Price, 20; *Ex parte Gibbs*, 2 Rose, 38.

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In re WALKER.

Sir J. CROSS.—We can only say it ought to be amended.

The order was made accordingly to take the fiat off the file, with liberty to amend it on new docket papers, if the Lord Chancellor should think fit (*a*).

Ex parte GREEN.—In the matter of HOLDER and others.

Westminster, April 25, 1832.

A petition for keeping separate accounts, which might be done under the general order, dismissed with costs.

THIS was a petition of the assignees for separate accounts to be kept under a joint commission against three partners, the firm having originally consisted of only two, and the third having been subsequently taken into partnership. There had been dividends declared under the joint estate of the three, and there was a fund, belonging to the estate of the two, more than sufficient to pay the creditors who had proved against that estate 20*s.* in the pound. But it seemed, that the commissioners doubted whether they could declare a dividend under that estate, until there was a special order obtained for keeping separate accounts.

Mr. *Rogers*, in support of the petition, cited *Ex parte Marlin* (*b*); and urged, that the debts incurred by the two partners, before the third was taken into partnership, should be paid by the assets of those two; and that this could only be effected by keeping the accounts distinct.

(*a*) And see *Ex parte Todd, ante*, p. 319. (*b*) 2 Bro. C.C. 15.

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ERSKINE, C. J.—It seems to be a matter quite in the ordinary course.

Sir A. PELL.—There appears to be nothing in the point. It would be very inconvenient, if in every case where the commissioners entertained the smallest doubt upon any matter, it should be the subject of a petition to this Court.

Sir G. ROSE.—The General Order (*a*) comprehends this case also. We shall therefore make no order; and you must not have your costs out of the estate.

Petition dismissed with costs.

(*a*) See Lord *Loughborough*'s General Order of 8th March, 1794.

Ex parte JAMES BETHUNE BOSTOCK.—In the matter of SAMUEL WELLMAN WRIGHT.

April 25, 28, & 30.

Where a creditor does not use due diligence to prove his debt, he is not entitled to petition to stay the bankrupt's certificate, in order to afford him time to do so, with a view of dissenting from its allowance.

THIS was a petition to stay the bankrupt's certificate, and expunge the debts of certain creditors. The petition stated, that the bankruptcy was declared on the 11th September 1830; and that the petitioner was a creditor for 2300*l.* and upwards, for business done as solicitor of the bankrupt. That he delivered his bill of costs to the bankrupt on the 23d August 1830; and

An affidavit by the bankrupt in answer to such a petition, filed two days before the hearing, may be read; but if it makes any charge of delay against the petitioner which he is anxious to explain, the Court will give him time for that purpose, more especially if the amount of his debt would turn the certificate.

A petition to stay the certificate, and expunge a creditor's name from it who had signed it, on the ground that he had been previously satisfied his debt, must be served upon the creditor.

A creditor, by petitioning to stay the certificate, makes his election to come in under the commission for every provable debt which may be owing to him from the bankrupt; and therefore, the bankrupt must be discharged from any action pending against him by the creditor in respect of any such debt, before the petition can be proceeded in.

The assignees cannot be heard, on a petition by an individual creditor to stay the bankrupt's certificate, although they may have been served with the petition.

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in September following the bankrupt obtained an order of the Court of K. B. for taxation thereof, and that the same had been accordingly submitted to the taxation of the master of the said Court: but owing to the great length of the bill, and also to the different businesses charged therein having been transacted in several Courts, and chiefly by reason of the very numerous objections by the bankrupt to nearly every part of the bill, the taxation had not yet been completed; which had prevented the petitioner from proving his debt under the said commission; and that he had no opportunity of making an enquiry into the bankrupt's conduct, and ascertaining whether he had acted justly to his creditors or not. That the taxation of the said bill of costs was now nearly completed, and would have been long since completed, but for the vexatious opposition of the bankrupt. That the bankrupt had very lately induced several creditors who had proved under the said commission to sign his certificate, and that the same was on the 3d April last signed by the commissioner, and now laid for confirmation and allowance. That the commissioner signed it, under the representation that the creditors who had signed constituted three-fifths in number and value of all those who had proved. That the debts proved of 20*l.* and upwards amounted to about 7887*l.* That amongst the creditors who had so proved and signed the certificate were *William Struthers*, who proved a debt of 314*l.* 15*s.* 5*d.*; *Andrew Cosser*, who proved a debt of 1102*l.* 10*s.* 7*d.*; and *William Hobson*, who proved for 1047*l.* 2*s.*, making in the whole the sum of 2464*l.* 8*s.* That *Struthers*, *Cosser*, and *Hobson* held other securities of one *Musgrave*, besides that of the bankrupt, for their debts.

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That under an arrangment made in April 1831 by the petitioner and *Musgrave* with the assignees, it was agreed that the petitioner and *Musgrave* should pay the said debts of *Struthers*, *Cosser*, and *Hobson*, and that the proof of such debts should be expunged from the proceedings. That the petitioner and *Musgrave* did accordingly some time before the date of the certificate, and before the same was signed by *Struthers*, *Cosser*, and *Hobson*, pay the whole of *Cosser*'s debt, and the whole of *Struthers*' debt except 4*l*., and also 300*l*. on account of *Hobson*'s debt. That *Cosser*, *Struthers*, and *Hobson* had since, and notwithstanding such payment, signed the bankrupt's certificate; and that the bankrupt and his solicitor were aware of these payments long before the signature of the certificate. That the total amount of debts of 20*l*. and upwards, proved by all the creditors who had signed the certificate, exclusive of *Cosser*, *Struthers*, and *Hobson*, did not amount to 3000*l*. And that by reason of the petitioner not having proved his debt, and of *Struthers*, *Cosser*, and *Hobson* having signed the certificate after the said payments, the consent of three-fifths in number and value of the creditors was obtained; which could not otherwise have been effected, without the petitioner's concurrence.

The petition therefore prayed, that the names of *Cosser* and *Struthers* might be erased from the certificate, and that the proofs of the debts of *Struthers* and *Hobson* appearing on the face of the proceedings might be reduced by the amounts so paid as aforesaid, and that the allowance of the certificate might be stayed until the taxation of the petitioner's bill should be completed, and the petitioner should have an opportunity

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of proving the amount of his debt under the commission; and that the petitioner might be at liberty to assent to, or dissent from, the allowance of the certificate, and that the same might for that purpose be sent back to the commissioner to re-certify; and for costs out of the estate.

The affidavits in support of the petition stated, amongst other things, that the bankrupt had expressed his determination to delay the taxation of the bill as much as possible. That the bill contained charges for business done in the Courts of King's Bench, Common Pleas, Chancery, Exchequer and Palace Court, and for business done in the Crown Office, and on the equity side of Exchequer, and for obtaining patents, and also for various conveyancing business and other matters, which very much protracted the taxation. And that the far greater part of the objections to the bill by the bankrupt had been disallowed.

The affidavits of the bankrupt, in opposition, stated, that on the 21st August 1830 he was arrested at the suit of the petitioner for 3636*l.*, and that about the 2d September 1830 he applied by summons to be discharged from the arrest, upon filing common bail; and that the Court of K. B. reduced the amount of the sum for which he was so arrested by 1059*l.* That notwithstanding such reduction, the petitioner about the 9th September 1830 arrested deponent, or caused him to be detained in custody, for this sum of 1059*l.*, but which arrest was subsequently set aside. That deponent was then out on common bail, at the suit of the petitioner, in respect of the first arrest for 2577*l.*, and that such second action for 1059*l.* was still depending. That, notwithstanding repeated applications for the particu-

lars of the demand in both such actions, deponent was unable to obtain the same till the 5th November 1831, being about fifteen months after the arrest, and nine months after the bankrupt's last examination. That no notice of trial had been given in either of the actions; and that the petitioner had never attempted to prove any debt under the commission. The deponent denied the delay in the taxation, which was imputed to him by the petitioner; and added, that before the Commissioner signed the certificate, the solicitor to the commission informed the Commissioner, that *Cosser*'s debt had been paid, and *Struthers*' also, except 5*l.*; but the Commissioner nevertheless thought that all the signatures were good, and accordingly signed it. That he believed the petitioner never intended to prove, or make any claim, under the commission; because, among other reasons stated, such proof might have subjected him to the jurisdiction of the Lord Chancellor in bankruptcy, to which he objected at the hearing of a petition presented to the Lord Chancellor, on the 4th July 1831, to invalidate a purchase made by the petitioner from the assignees; and which objection was allowed by the Vice-Chancellor.

The affidavit of the petitioner, in reply, accounted for the delay in omitting to prove his debt, by showing, that the master who was directed to tax the bill, and the solicitor for the bankrupt, were unable to attend the several appointments which were made for that purpose.

The affidavit of the bankrupt, in rejoinder, stated, that the whole of that part of the bill, which related to business in the Court of Common Pleas, was taxed on the 21st June 1831, that in the Exchequer on the 2d

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March 1831, and that in the Court of Chancery several months ago. It also expressly denied, that any obstacles had been thrown in the way of taxation by the bankrupt, or his attorney.

Mr. *Koe*, for the petitioner, took a preliminary objection to the reception of the bankrupt's first affidavit in answer to the facts stated in the petition; which he contended could not be read, as it was filed so late, that he had had no opportunity of seeing it.

Mr. *Montagu*, who appeared with Mr. *Swanston* for the bankrupt, said, that it was filed the day before yesterday, and that the petitioner was bound, *strictissimi juris*, to search for the affidavit in the Bankrupt Office.

The Court directed that the affidavit should be read by the officer of the Court, which was accordingly done.

Mr. *Koe* then applied for time to be granted to the petitioner, to explain the facts stated in the bankrupt's affidavit, and especially the imputations of delay which the bankrupt had therein charged upon the petitioner.

Mr. *Montagu* and Mr. *Swanston, contrà*, urged, that such an application was contrary to the established practice of the Courts of Westminster Hall. The affidavit of the bankrupt was merely in answer to the allegations contained in the petition, and was introductory of no fresh matter; the petitioner therefore had no right to file any affidavit in reply. The rule is, on a petition to stay the certificate, that the petitioner shall file his affidavits with, or before, the time of presenting

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his petition (*a*). This is an exception to the general rule, as to filing affidavits on other petitions in bankruptcy, which renders them inadmissible in evidence, if they are sworn before the petition is answered (*b*).

Erskine, C. J.—The wilfulness of the delay attributed to the petitioner is a material ingredient of the case; and though the facts stated in the bankrupt's affidavit do not appear to me of such importance, as absolutely to require an answer, yet if the petitioner is anxious to explain himself on the subject, I think he should have an opportunity of doing so.

Sir G. Rose.—Whenever a creditor opposes the allowance of a bankrupt's certificate, the Court infers, that he has stated all his facts in opposition. The Court, however, will for its own satisfaction give the petitioner an opportunity of explaining any facts, which make against the prayer of his petition; though this is not a matter of course (*c*). But as it appears in this case, that the amount of the petitioner's debt would turn the certificate, it is right that he should be permitted to reply to the bankrupt's affidavit.

Mr. *Montagu* then objected, that the petitioner, having sued the bankrupt for one demand, could not now prove any debt, without relinquishing his action. That by applying to stay the certificate he had made an election to proceed under the commission, and that

(*a*) See Lord *Loughborough*'s General Order of 12 April 1796, qualified by Lord *Eldon*'s General Order of 16 November 1805.

(*b*) See *Ex parte Northwood*, 2 Rose, 216; *Ex parte Overton*, id. 257.

(*c*) This observation of the learned judge entirely accords with Lord *Eldon*'s General Order of 16 November 1805.

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he certainly had now done every thing he could do, to take the benefit of the commission with the other creditors who had proved their debts under it.

The Court decided, that the bankrupt must be discharged from the action, before the petition could be proceeded in (*a*).

April 28.

Mr. *Koe*, and Mr. *H. N. Coleridge*, appeared this day in support of the petition, on the merits; and contended, *first*, that those creditors, whose debts had been extinguished, were incompetent to sign the certificate. No party can be entitled to sign it, unless he is entitled to a dividend. It is admitted that, according to the case of *Ex parte Herbert* (*b*), the assignor of a debt, which he had previously proved under a commission, was entitled to sign the certificate, because the legal title was still in him, the debt still existing, and the assignee being only entitled through the assignor to receive the dividend. Here, however, the debt was gone altogether. They also referred to the cases of *Ratcliffe* v. *Gunson* (*c*), and *Ex parte Gee* (*d*). The words also of the statute (*e*) were, not that the "*person*," who had proved, should sign the certificate; but "that such certificate shall be signed by three-fifths in number *and value* of the *creditors* of the bankrupt, who shall have proved," &c.; requiring, therefore, that the party signing shall

(*a*) And see *Ex parte Lord*, 2 Rose, 421; and *Ex parte Blaydes*, 1 G. & J. 179. And see 6 *Geo.* 4. c. 16. s. 59. See also *Ex parte Dickson*, 1 Rose, 98; *Ex parte Hardenbergh*, id. 204; *Ex parte Irving*, Buck, 423; and 1 Deac. B. L. 184.

(*b*) 2 G. & J. 66; 1 G. & J. 399.

(*c*) 6 Mad. 193.

(*d*) 1 G. & J. 330.

(*e*) 6 *Geo.* 4, c. 16, s. 122.

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not only have proved, but that he shall be at the time of such signature a "*creditor.*"

Secondly. As the petitioner's bill of costs was still undergoing taxation, the allowance of the certificate ought to be stayed till such taxation was completed; so as to afford the petitioner an opportunity of proving, and afterwards assenting to or dissenting from the certificate; unless a clear case was made out of any delay in the taxation having been occasioned by the petitioner. No such delay, however, could be reasonably attributed to the petitioner. [*Rose*, J. It seems to me strong evidence of no intent to prove, that the taxation has throughout proceeded, not between the assignees and the petitioner, but between the petitioner and the bankrupt, the assignees taking no part in it.] The only object was to proceed with the taxation, so as to prove under the commission the amount to which the bill might be reduced. [*Erskine*, C. J. You cannot petition to stay the certificate, in order to give time to prove a debt, unless you show, that every due diligence has been used by you for that purpose.

April 30.

Mr. *Bethel* appeared this day on behalf of the assignees.

Mr. *Montagu* objected that the assignees could not be heard on this petition.

Mr. *Bethel* contended, that inasmuch as it was the duty of the assignees to see that the certificate was properly signed, and they had been served with the petition, they had a right to be heard. It would be monstrous, to put the estate to the expense of a fresh

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petition, for the purpose of obtaining the same object as those sought by the present.

The Court however were of opinion, that the assignees had no right to be heard.

Mr. *Montagu* then took a preliminary objection, that *Cosser*, one of the creditors whose debts were sought to be expunged, had not been served with the petition.

Mr. *Koe*, and Mr. *Coleridge*, insisted, that *Cosser* was not a necessary party before the Court. He had been satisfied his claim, and had therefore no interest whatever in the question. The only dispute was between the petitioner and the bankrupt. No interest, which *Cosser* had, could be affected by the decision of the Court, either one way or the other. Those, only, who are interested, are to be brought before the Court. Nothing is sought by the petitioner against *Cosser*. He is no suitor, and, if here, could do nothing. Supposing *Cosser* had opposed the certificate, after his debt was satisfied,—could it be contended that such opposition would affect the certificate? The objection is made by a third party, who has no right to take it; and, moreover, ought to have been made at the commencement of the hearing, and now came too late. The certificate was not signed by three-fifths of the creditors, as required by the act; so that at least the petition must stand over, if *Cosser* were a necessary party, in order to serve him; otherwise, an immediate dismission of it would have the effect of repealing the act of parliament, by allowing the certificate when it was not signed according to law.

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Mr. *Montagu* and Mr. *Swanston*, in reply, contended, that a petition to stay the certificate was never allowed to stand over, if imperfectly served; and they relied on *Ex parte Curtis* (*a*), *Ex parte Cundall* (*b*), *Ex parte Harrison* (*c*), *Ex parte Hirst* (*d*), *Ex parte Long* (*e*), and *Ex parte Isbester* (*f*). And as to *Cosser*'s right to sign the certificate, and the obligation to serve him,—the creditors are, by law, placed in a kind of judicial situation, with regard to their signature of the bankrupt's certificate. They should be guided by their knowledge of the bankrupt's conduct, and are bound to exercise the powers, which the law has entrusted to them, with due deliberation in their own minds. If that right is ever impugned, they ought at least to be heard in defence of it. This principle was recognized in the case of the assignor of a debt, as in *Ex parte Herbert* (*g*), as well as in that of a surety, both by the act of parliament, and by the case of *Browne* v. *Carr* (*h*). With respect to the bankrupt being only a third party, it is in every day's practice, for a third party to object to the want of service of a petition on any other party, who ought to have been served with it. The Court itself is bound to take an objection of this nature; otherwise, if a petitioner choose to serve no party, this monstrous absurdity would follow,—that no one could take the objection; and his petition would therefore be granted of course.

Mr. *Barlow* appeared for the creditor *Hobson*.

(*a*) 1 Rose, 274. (*b*) 1 G. & J. 37. (*c*) 1 G. & J. 71.
(*d*) 1 G. & J. 76. (*e*) 1 G. & J. 351.
(*f*) Note 4 E. p. 74, Mont. Annual Dig. A. D. 1822.
(*g*) 2 G. & J. 66. (*h*) 7 Bing. 508.

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ERSKINE, C. J.—This objection ought strictly to have been made at the opening of the argument on this petition, but we think it is one that can never come too late. The right of signature rests with the creditors; and if you seek to devest a creditor of that right, he clearly ought to be before the Court; for he ought not to be deprived of his rights behind his back. We therefore think, that that part of the petition seeking to expunge *Cosser*'s name from the certificate cannot be granted.

[At this moment *Cosser* himself appeared in Court, and stated his readiness to accept service of the petition, and be bound by the decision of the Court.]

ERSKINE, C. J.—The judgment has been already pronounced as to that point, and it is now therefore too late to take advantage of such acceptance. Neither can we stay the certificate, in order to afford an opportunity of properly serving the petition on *Cosser;* for we are bound by the authorities cited on behalf of the bankrupt. We also think it ought not to be stayed, to afford the petitioner time to prove his debt; for we think, that he has had ample time for that purpose, if he had been really desirous to place his proof on the proceedings. His object has evidently been, not to proceed before the Commissioners; for the plain course he should have pursued was, to attend before them, and give notice to the assignees to expedite the taxation. Instead of doing this, he has all along treated the bankrupt as the only party interested in the matter. We therefore think that the petitioner has not used that due diligence to prove his debt under the commis-

sion, which entitles him now to call upon us to stay the bankrupt's certificate.

The rest of their Honors concurring,

The petition was dismissed with costs.

The order drawn up was as follows:—

" It is ordered, that the said petition be, and the same is hereby dismissed; and that the said certificate of conformity of the said *L. W. Wright*, the bankrupt, be forthwith allowed and confirmed. And it is further ordered, that the said *J. B. Bostock* do pay to the said assignees, and also to the said *L. W. Wright* and *William Hobson*, their respective costs occasioned by this application; and that such costs be taxed by the Master of the Court of Chancery in rotation, if the parties differ about the same."

1832.

Westminster, April 27.

Practice in Court.

THE Court intimated, that motions or petitions consented to, or unopposed, might be brought on at the sitting of the Court, before the paper of the day was gone into. But that none which were opposed would be taken until after the paper was gone through.

KING'S COLLEGE. LONDON.

Ex parte JOHN DAVENPORT, HENRY DAVENPORT, and MOUNTFORD FYNNEY.—In the matter of JOHN LEECH.

1832.

Westminster, April 27, May 3.

The custom at the London Docks is to acknowledge no title in wines, unless accompanied with possession of dock-warrants indorsed by the party to whom they originally issued. Where *A.* received warrants from *B.* not indorsed by *B.*, and *A.* delivered and indorsed them to *C.*, who afterwards procured *B.*'s indorsement, and *A.* became bankrupt:—Held, the wines passed to *C.*, though notice of transfer, to dock company, and indorsement by *B.*, were subsequent to the bankruptcy. Held also, that for want of *B.*'s indorsement to *A.* and transfer into *A.*'s name in the company's books, *A.* never had the order and disposition of them.

THIS petition, and the affidavit in support of it, stated, that the bankrupt stood indebted to the petitioners in the sum of 1500*l.* for monies lent at various times, and for goods sold. On the occasion of his borrowing the last sum advanced to him, the petitioners requested security for the whole amount due to them; for which the bankrupt accordingly gave a promissory note, (which had not arrived at maturity at the time of the bankruptcy,) and also certain dock-warrants for wines then lying in the London Docks, which it appeared had been transferred, though not indorsed, by one *Medley* to the bankrupt. The bankrupt, however, indorsed these warrants at the time of delivering them to the petitioners, and they were accompanied with a certain memorandum of agreement expressive of the terms of the deposit dated the 8th December 1831. The petitioners afterwards caused these warrants to be exchanged at the docks for similar warrants, making the wines deliverable to the petitioners, or their order, by indorsement on the warrants, which last mentioned warrants the petitioners still held. The commission was issued on the 22d December 1831, and the act of bankruptcy took place the day preceding.

Under these circumstances, the petitioners prayed that they might be declared equitable mortgagees of the wines, and for the usual order for sale, and liberty to bid, &c.

Mr. *Montagu*, for the petitioners, relied on the

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cases of *Lucas* v. *Dorrien* (*a*), *Zwinger* v. *Samuda* (*b*), *Ridout* v. *Lloyd* (*c*).

Mr. *Swanston*, for the assignees, referred to an affidavit which the bankrupt had made in this matter, stating that at the time of the above transaction he was in a state of insolvency. He then contended that this assignment was a fraudulent preference; and that the mere transfer or delivery of the dock-warrants was, according to the case cited on the other side, not sufficient to pass the equitable interest in the wines to the petitioners. In order to make the transfer valid, there ought to have been an indorsement on the warrants themselves, and notice of the transaction given to the bailees. Until such notice was given, the goods were merely *in transitu*, and might have been stopped by the bankrupt; so that no property could at that time pass to the petitioners. The mere circumstance of the warrants having been received by the petitioners from the dock company, in exchange for those delivered by the bankrupt to the petitioners, although they referred to an indorsement having been made on those delivered by the bankrupt, was not in itself sufficient to warrant the Court in presuming that the indorsement was actually made. The property therefore was never effectually parted with by the bankrupt, but remained in his reputed ownership, and consequently passed to his assignees.

The COURT, being of opinion that they could not decide the case, without having before them some evidence of the fact of the indorsement, or of the

(*a*) 1 Moore, 29; S. C. 7 Taunt. 278. (*b*) 7 Taunt. 265. (*c*) 1 Mont. 103.

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Ex parte DAVENPORT and others. *May* 3.

custom to transfer the warrants without such indorsement, desired the case might stand over for that purpose.

The case was accordingly brought on again this day, when witnesses were examined *vivâ voce* as to the points on which the Court desired further information.

It was stated by *Thomas Coxhead*, an accountant in the wine department at the London Docks, that the three warrants delivered by the bankrupt to the petitioners were not lodged by them at the dock office until the 8th January 1832; that the warrants had then an indorsement on them from *Medley*, dated the 4th January, and that there was no previous notice of the transfer of the warrants to the petitioners. He stated that the custom of the office was, on the application of a party to whom warrants were indorsed, to give him fresh warrants instead of the old ones, and that the wines are afterwards delivered to any one who brings in the warrants last issued, without requiring previous notice of any transfer. But that the wines are never delivered without the production of the warrants, nor without the indorsement of the party to whom the warrants have been issued. The witness added, that the wines stood in the name of *Medley*, in the dock company's books on the 21st December last, and that they would therefore not have been delivered to any one without his indorsement; but that since the 4th January the wines have stood in the name of *Davenport* & Co. On his cross-examination, the witness stated he was aware of the bankruptcy of *Leech*, when he issued the fresh warrants to the petitioners, and that he made no objection on that ground to exchanging the warrants.

A clerk of the petitioners proved, that towards the

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end of November 1831, the bankrupt applied to the petitioners for a loan of money, and that they agreed to lend him 1000*l.* on the security of the warrants; that accordingly 500*l.* was advanced to him on the 7th December; previously to which the bankrupt indorsed two of the warrants; and the remaining 500*l.* was advanced on the 8th December, after the petitioners had tasted the wines, and after the bankrupt had indorsed the third warrant.

Mr. *Swanston* then contended, that the evidence did not help the difficulty of the transfer of the wines, being insufficient to pass the property in them to the petitioners; for they were not legally transferred until after the act of bankruptcy. The simple question is, whether the transfer was so complete before the bankruptcy as to change the property. The mere delivery of the warrants indorsed by the bankrupt was not sufficient for this purpose; but in order to render the transfer effectual, notice should have been given before the bankruptcy to the warehousekeeper at the London Docks, who was in strictness the agent of the bankrupt. How can there be a change of agency without any notice to the agent? The indorsement of a bill of lading stands on a different footing; for there it is a matter of necessity that the property should pass by the mere indorsement, the goods being at sea, and it being impossible in general to give notice to the bailee. This therefore is an exception for the benefit of trade. The cases cited on the other side do not mend the petitioners' case as to want of notice to the warehousekeeper.

In *Zwinger* v. *Samuda* (*a*) the Court expressly

(*a*) 7 Taunt. 265.

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guarded against any inference that an indorsement on the dock-warrants was, of itself, and without making the wharfingers parties to the order, capable of transferring any property in the goods therein described. In *Lucas* v. *Dorrien* (*a*) there was notice to the warehousekeeper, and the case of *Ridout* v. *Lloyd* (*b*) does not seem to apply to this; for in that case the bankrupt was merely a trustee, and had never any control whatever over the dock-warrants. The liability of principal and agent cannot be legally terminated, any more than commenced, without notice; nor ought this Court to extend such liability. It was merely the agency of the warehousekeeper that constituted the ownership of the bankrupt; and there was no change in such agency until the 7th January, before which the bankruptcy had taken place.

ERSKINE, C. J.—The question is, in this case, whether the warrants were in the order and disposition of the bankrupt at the time of the bankruptcy. It is said, that the mere indorsement of the warrants is not a sufficient transfer. But it is not necessary to raise that question, as there was no indorsement from *Medley* to the bankrupt, and the wines were never transferred into the name of the bankrupt in the dock company's books. The bankrupt, however, took the only means he possessed of transferring the property, by indorsing the warrants (which were the only instruments and symbols of property held by him) before his bankruptcy. If the mere indorsement of the warrants was not sufficient to transfer the property, then the wines continued the property of *Medley* and not of the bankrupt, to whom

(*a*) 7 Taunt. 278. (*b*) 1 Mont. 103.

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they were never transferred in the dock company's books.

Sir A. PELL.—To the proposition put by Mr. *Swanston* I cannot give my assent. He says that the warrants continued the property of the bankrupt until the 7th January. But I apprehend that all the interest which the bankrupt had in them passed entirely away from him, when he indorsed them to *Davenport* & Co. I should as soon think of checking the transfer of a bill of lading by indorsement, as imposing a restriction upon this mode of transferring dock-warrants.

Sir J. CROSS.—The parol evidence has disclosed the essential facts upon which the question turns. If the indorsement of these warrants is not sufficient to pass the property in the wines to the petitioners, then the property in them was never in the bankrupt, as they were never transferred into his name by the warehouse-keeper of the London Docks.

Sir G. ROSE.—I entirely concur with the rest of the Court. There is no question that the transfer of these dock-warrants, before the act of bankruptcy, would have passed the property to the petitioners, unless they knew of his insolvency. Then the question simply is, what was the relation of these parties on the 8th of December? The test of reputed ownership is, could *Leech* have obtained false credit in the world by means of these warrants? Now, the warrants were no longer in his possession, nor were the wines standing in his name at the docks. Can it be said, then, that the wines were in his order and disposition, when the

witness expressly said that he would not have delivered them to any one who did not produce the warrants?

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The usual order was therefore made, declaring the petitioners to be equitable mortgagees, and directing the wines to be sold, &c.

Ex parte WILLIAM SKINNER, the Elder, and WILLIAM SKINNER, the Younger, and GEORGE SKINNER.—In the matter of RICHARD BELL.

Westminster, April 27.

Where *A.* accepted bills for the accommodation of *B.*, and *B.* deposited title deeds of *A.*'s with *C.*, the holder of the bills, as security for their payment, a letter from *A.* to *C.* referring to the existence of the debt, and saying "*the security you hold is a great deal more than you hold acceptances for on my account, my real account is not more than half you hold, but you have full security for all and more.*"—Held, a sufficient acknowledgement of the security to the full amount of bills, though *B.* had no direct authority to pledge.

THE petitioners in this case were bankers at Stockton, in Durham, and also at Stokesley, in Yorkshire. One *John Mease*, in the year 1829, drew bills of exchange upon the bankrupt, *Richard Bell*, for goods sold, which bills were usually payable at two or three months. The petitioners discounted five bills of exchange drawn by *Mease*, and accepted by the bankrupt, for sums amounting to 1014*l.* 15*s.* In consequence of the applications of the petitioners to the bankrupt and *Mease* for security for this sum, the bankrupt, in March 1830, delivered to *Mease* an indenture of release of certain property situate at Middleham, in Yorkshire, which he requested *Mease* to deposit with the petitioners, in order to secure to them the amount of the bills accepted by the bankrupt, which *Mease* accordingly did, and the release was still in the possession of the petitioners. In consequence of an application to the bankrupt by the petitioners for a further security for the amount of the bills, in the month of January

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1831, the bankrupt wrote and sent to the petitioners the following letter, dated the 14th January 1831 :—

"Gentlemen, I duly received yours this morning, and in reply, beg to say that I am much obliged to you for your kind indulgence. I have no objection to the bills being renewed; and you may rely on it nothing shall be wanting on my part to reduce them as soon as possible; *but the security you hold is a great deal more than you hold acceptances for on my account*, and more than I really owe by one-half. I should be very sorry to take what I owe you for the property. But my wish is to pay you. It is of no consequence what the property cost; it is what is it worth, * * * *my real account is not more than half you hold;* but you have *full security for all and more.* I am, &c. *R. Bell.*"

The petitioners in consequence renewed five of the bills, which they still held, namely, one of such bills bearing date 20th January 1831, for 214*l.* 15*s.* payable at three months after date; another dated 1st September 1831, for 200*l.* payable at two months; a third dated 13th September 1831, for 200*l.* at three months; a fourth dated 24th September 1831, for 200*l.* payable at two months; and a fifth dated 30th September 1831, for 200*l.* at two months; all drawn by *Mease* upon and accepted by the bankrupt, and all which had become over-due.

The commission issued 29th November 1831.

The petition prayed that the assignees might redeem the premises comprised in the indenture of release, and pay off the mortgage debt; or that a sale might be directed and the proceeds applied to pay off the mortgage, with liberty to prove for the deficiency.

An affidavit filed in opposition to the prayer of this

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petition stated, that the bills were accepted for the accommodation only of *Mease*. That being indebted to *Mease* in the sum of 300*l.* he, the bankrupt, deposited the deed in question with him as a security for that sum. That he never authorized *Mease* to deposit the deed with the petitioners, as a security for the amount of the bills which he had accepted for the accommodation of *Mease;* but he agreed that it should be deposited as a collateral security for the due payment of the same, in case any security given to the petitioners by *Mease* should prove insufficient; and that the letter above referred to was written under that impression.

It also appeared, that the bills above referred to were subsequently renewed by the bankrupt, when they became due in the hands of the petitioners.

Mr. *Wigram*, and Mr. *Faber*, for the petitioners.

Mr. *Bethel*, for the assignees, contended, that the deed not being delivered by the bankrupt to the petitioners, but by *Mease*, who had at the time of the deposit no direct authority for that purpose from the bankrupt, could not entitle the petitioners to insist on the prayer of their present petition, and that at all events the deposit could only operate to the extent of the debt *bonâ fide* due from the bankrupt to *Mease*, and not to the full extent of the bills due to the petitioners. Even if the letter written by the bankrupt to the petitioners were taken to constitute an equitable mortgage to secure any debt, there is nothing to connect that letter with the present claim. The letter refers to bills then in existence, and the bills on which the peti-

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tioners now claim appear to be drawn long since that time. *Ex parte Mountford* (*a*) shows that an equitable mortgage does not extend to future debts.

The COURT, however, thought that the letter of the bankrupt, and more especially that part which says, "but the security you hold is a great deal more than you hold acceptances for on my account, and more than I really owe by half. I should be very sorry to take what I owe you for the property," was a sufficient memorandum to entitle the petitioners to hold the premises as a security for the debt due from *Mease*. There could be no doubt but that the bankrupt was indebted to the petitioners in the full amount of the bills accepted by him, whether they were or not drawn for the accommodation of *Mease*. And as, in point of fact, the present bills were merely those substituted for the original bills, on which the deed was deposited, when they were renewed at the instance of the bankrupt, the deposit must be considered as being applicable to the demand in respect of them also, and therefore that the case of *Ex parte Mountford* did not apply to the present.

The petitioners were therefore declared to be equitable mortgagees, and the usual order was directed according to the prayer of the petition.

(*a*) 14 Ves. 606.

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Ex parte JAMES HANNEN.—In the matter of THOMAS TRANSFIELD.

Westminster, April 28.

Where deeds were deposited for securing 150*l.* to be advanced in cash by discounting bills, and 150*l.* in goods :— Held, the security could not be extended to 162*l.* for cash advanced (the additional 12*l.* being for interest and stamps on a renewed bill) although only 63*l.* was advanced in goods, but must be limited to the 150*l.* in cash, and 63*l.* in goods ; 213*l.* in toto.

THE petition stated that *Transfield* was declared a bankrupt about the 19th January 1832. In October 1830 the bankrupt was possessed of certain leasehold premises in Spencer Street, Battersea, for the residue of the term of 80 years from March 1778. In the month of October 1830 an agreement was entered into between the petitioner and the bankrupt, that the former should advance the latter the sum of 150*l.* in money, and that the same should be paid by discounting for the bankrupt two bills of exchange, to be accepted by him and drawn by the petitioner, payable at six and twelve months after date, for sums amounting to 50*l.* and 100*l.*, together with the amounts of the discounts of the said bills, and the stamps for the same, which were supplied and paid for by the petitioner; and further, that the petitioner should supply the bankrupt with such goods as he should require for carrying on his business, not exceeding the amount of 150*l.*; provided the said two sums of 150*l.* each should be secured to the petitioner, by a deposit with him of the title-deeds of the bankrupt relating to the above-mentioned leasehold premises. Accordingly on the 12th October 1830 the petitioner took a deposit of the title-deeds from the bankrupt, together with a memorandum duly signed by him as follows:—

" Memorandum. To Mr. *James Hannen*, Northumberland Street, Strand. In consideration of your accommodating me with cash in amount one hundred and fifty pounds, and with such goods, &c. as I may require to conduct my business, not exceeding the sum of 150*l.*,

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I hereby deposit certain deeds of houses in Spencer Street, Battersea, as a collateral security for the aforementioned two amounts, making 300*l.*, should I become so much indebted at any time from the date hereof. And I further undertake to execute a mortgage, on demand, on the above premises, for the said sum, or such sum or sums that I may become indebted, not exceeding 300*l.*, from the date hereof.

"*Thomas Transfield.*"

In pursuance of this agreement the petitioner advanced and paid to the bankrupt, on the 15th October 1830, the sum of 150*l.*, by discounting for him two bills of exchange accepted by him and drawn by the petitioner, and dated on that day, one of which was payable at six months after date, for the sum of 51*l.* 10*s.* 6*d.*; and the other at twelve months after date, for the sum of 105*l.* 10*s.* 6*d.*; these sums being the amount of the respective sums of 50*l.* and 100*l.*, with the addition of the stamps and discount, the stamps having been provided and paid for by the petitioner. The bill for 51*l.* 10*s.* 6*d.* became due on the 10th April 1831, when the bankrupt having failed to pay it, the petitioner agreed, on the 15th April, to take a renewed acceptance of the bankrupt for the sum of 52*l.* 8*s.* 6*d.*, payable at three months after date; which amount included the charges for noting and for the stamp, and discount of such renewed acceptance. This last bill was also dishonoured, and continued in the hands of the petitioner, the principal and interest, with the noting, amounting to 54*l.* 7*s.* 6*d.*, which was still due to the petitioner on the security of the leasehold premises, by way of equitable mortgage. The bill for 105*l.* 10*s.* 6*d.* became due on the 18th October 1831, and was in like

manner renewed by another bill at three months for 107*l.* 4*s.*, which amount included the like costs and expenses as on the renewal of the former bill. This last bill was also dishonoured, and was still in the petitioner's possession, the principal and interest and charges due thereon amounting to the sum of 108*l.* 8*s.*, which was still also due on the security of the said premises.

On the balance of accounts between the bankrupt and the petitioner for goods, there was also 63*l.* 18*s.* 7*d.* due to the petitioner.

The petitioner claimed to be entitled to hold the premises as a security for the whole debt due to him, namely, 63*l.* 18*s.* 7*d.* for the goods, and 162*l.* 15*s.* 6*d.* for the amount of the two bills.

Mr. *Bagshawe*, for the petitioner, contended that the petitioner ought to be declared an equitable mortgagee for the whole of these two sums, and that the security for cash advanced ought not to be limited to 150*l.*; for as the sum due for goods advanced amounted only to 63*l.* 18*s.* 7*d.*, and the whole deposit was made to secure the petitioner to the extent of 300*l.*, the surplus of the cash advanced above the 150*l.* ought to be thrown on the security for the goods, so as altogether to stand good for the 226*l.* 14*s.* 1*d.*, the whole amount due.

Mr. *Jeremy* appeared for the assignees.

The COURT considered that they could not enlarge the terms of the security, nor throw the surplus of the money agreed to be lent and secured by the deposit,

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on that which was expressly provided for the amount of the goods advanced; and accordingly declared the petitioner entitled, as an equitable mortgagee upon the premises, to the extent of 150*l.* for the money lent, and 63*l.* 18*s.* 7*d.* for the goods advanced, and not for the 12*l.* 15*s.* 6*d.*, the surplus of the 150*l.*, for discount, stamps, noting, and interest.

The costs of all parties were ordered to be paid out of the produce of the sale; those of the assignees to be paid in the first instance.

Ex parte WOOD.—In re SWAINSON and MUSTELL.

April 30.

Bankrupt has houses of business at *L.* & *M.* majority of creditors living at *M.* Order necessary to obtain country commission at *M.*

MR. *MONTAGU* applied that a *fiat* might issue for a country commission against the bankrupt, to be opened at Manchester. The bankrupt had a house of business in London and also at Manchester; but as the majority of his creditors resided at Manchester, it would be most convenient that the commission should be opened at the latter place.

The COURT thought that the application was reasonable, and therefore granted it; observing, that it could not be done without an order to that effect.

Ex parte The LANCASTER CANAL NAVIGATION COMPANY.—In the matter of JOHN DILWORTH, ROBERT MORLEY ARTHINGTON, and ROBERT BIRKETT, Bankrupts (*a*).

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Coram Lord Chancellor, May 1.

Where a company is formed by act of parliament for the purchase of lands to make a canal, and the act declares that the shares "*shall be deemed personal estate, and shall be transmissible as such*:"—Held, that though the profits arose out of land, the shares were personal property, passing as such, to the assignees on the bankruptcy of a proprietor.

Where an act prescribes certain forms in the transfer of such shares :—Held, unless they are strictly complied with, the shares remain in the order and disposition of the bankrupt proprietor, the ordinary mode of transfer not constituting an equitable mortgage. And though the act only expressly relates to transfers between third parties, yet it impliedly relates to where the company are the transferrees.

THIS was a petition for a rehearing and reversal of a judgment of Lord Chancellor *Lyndhurst*, dated 5th December 1829.

The following dates may tend to simplify and shorten the statement of the circumstances of the petition, and of the numerous applications and decisions made in this matter.

On 13th February 1826, the commission issued against the above-named bankrupts.

22d January 1827, the Canal Company petitioned for a sale of *John Dilworth*'s shares in the canal, upon which they claimed an equitable mortgage, for the balance due from him as their treasurer; the mortgage relied upon being constituted by a transfer of the shares executed by *Dilworth*, but not registered according to the canal act.

17th August 1827, Sir *Anthony Hart*, V. C. expressed an opinion unfavourable to the claim but gave no judgment.

22d February 1828, The petition was amended.

13th August 1828, Sir *L. Shadwell*, V. C. gave judgment directing a sale.

19th November 1828, The assignees appealed.

13 August 1829, The case fully argued before Lord *Lyndhurst*.

6th November 1829, The Canal Company petitioned that the case might be re-argued before judgment was given.

(*a*) See this case S.P. before Lord *Lyndhurst*, 1 Mont. 116, and on another point, 1 Mont. 27.

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14th November 1829, Lord *Lyndhurst* declined a further argument.

5th December 1829, Lord *Lyndhurst* gave judgment, discharging the Vice-Chancellor's order and giving the assignees the costs of the re-hearing.

25th April 1831, The present petition for re-hearing and reversal of Lord *Lyndhurst*'s order and praying for the adoption of the Vice-Chancellor's order of the 13th August 1828, was presented.

The present petition stated, that at the date of the commission, the petitioners, the Lancaster Canal Company, were creditors of the bankrupts to the amount of 8703*l.* 15*s.* 5*d.* for which they held as security 300 shares in the Lancaster Canal Navigation, belonging to the bankrupt *Dilworth*; and recited the petition of appeal 19th November 1828, which set out the title of the Canal Act, 32 *Geo.* 3. c. 101.; the 83d section, as to the appointment of a treasurer; the 122d section, as to the security to be taken of the treasurer; the 63d section, as to the number of shares; the 79th, as to the power of sale and the form of it(*a*). And stated that on the 6th of August 1822, the bankrupts, who were bankers in Lancaster, were duly elected and chosen as the treasurers of the Canal Company, and executed a bond for the due performance of the trust. *Dilworth* was the proprietor of 345 shares in the Canal Navigation, and the company requested him to give them some further security for the due payment to them of what might be due from him as treasurer, and for the due execution of his trust. Accordingly *Dilworth* agreed to transfer 300 shares, being part of the 345 shares, to the com-

Petition of appeal from V.C.'s order, 19th November 1828.

(*a*) These sections are set out *post*, together with the 62d, 66th, and 67th sections, upon which the argument and judgment mainly depended.

pany as such further security, and by an assignment bearing date September 1822, transferred and assigned the 300 shares to the company to hold to them, their successors and assigns, subject to the rules and orders and on the same conditions as *Dilworth* held them: and by indenture bearing date September 1822, between *Dilworth* of one part and the company of the other, after reciting the above request and agreement, it was witnessed, that the company should stand possessed of the shares, to pay the dividends thereof to *Dilworth* or his assigns so long as *Dilworth* and Company should duly account, &c. with the company as treasurers, and otherwise to sell and apply the produce of shares to make good any deficiencies in their accounts as such treasurers.

The transfer and deed of trust were duly executed and left with the clerk of the company but had since been lost or mislaid. At the time of the appointment of the bankrupts as treasurers, it was expressly agreed that the bankrupts should accept and keep the account of the monies received by them as such treasurers as a banking account, and that interest should be received or allowed by them according as the balance of cash in their hands was credit or debit. A banking account was thereupon opened at the banking house by the bankrupts as such treasurers, and according to the agreement, interest was charged in such account on the balance from time to time due thereon, and a half-yearly statement of the account was made out by the bankrupts up to and ending the 1st January 1826, and was by them sent to the office of the company, by which statement it appeared that 7625*l.* 16*s.* 8*d.* was then due to the company for principal, and 27*l.* 8*s.* 10*d.*

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for interest, making together 7653*l.* 5*s.* 6*d.* At the date of the commission, 13th February 1826, there was 8703*l.* 15*s.* 5*d.* due to the company.

The original petition of the 22d January 1827 prayed for the usual order for sale, &c. in cases of equitable mortgage, which the Vice-Chancellor on 13th August 1828 directed accordingly. And the petition of appeal of the 19th November 1828 prayed a reversal of the Vice-Chancellor's order.

After the argument and before judgment on the petition of appeal, the Canal Company petitioned for a re-argument; but this was refused; and Lord *Lyndhurst*, C. gave judgment reversing the Vice-Chancellor's order on the ground that such shares were goods and chattels and in the reputed ownership of *Dilworth* at the time of his bankruptcy (*a*). (Subsequent proceedings were had, which are succinctly detailed in 1 Mont. 27, 211.)

The present petition prayed that the petition of appeal presented by the assignees on the 19th November 1828 might be reheard, and that Lord *Lyndhurst*'s order of the 5th December 1829 might be reversed.

The act, on the construction of which the matter principally rested, is the 32 *Geo.* 3. c. 101., entitled "An Act for making and maintaining a Navigable Canal from Kirkby Kendal, in the County of Westmorland, to West Houghton, in the County Palatine of Lancaster, and also a navigable branch from the said intended Canal at or near Borwick to or near Warton Cragg, and also another navigable branch from, at, or near Gale Moss, by Chorley, to or near Duxbury, in the said County Palatine of Lancaster."

By the 62d section it is provided, that "to the end

(*a*) See this judgment, *post*, 420.

the said Company of Proprietors may be enabled to carry on so useful an undertaking, be it enacted, &c., that it shall and may be lawful to and for the said Company of Proprietors, and their successors, to raise and contribute among themselves, in such proportions as to them shall seem meet and convenient, a competent sum of money, for the making and completing the said canal branches, and the roads and other ways, works, and conveniences to the same belonging, or requisite thereto respectively; provided that the said sum does not exceed the sum of 414,100*l.* in the whole, except as hereinafter mentioned, and that the same be divided into such number of shares as hereinafter directed, at a price not exceeding 100*l.* per share, and *the money so to be raised is hereby directed and appointed to be laid out and applied*, in the first place, for and towards the payment, discharge, and satisfaction of all fees and disbursements for obtaining and passing this act, and for making the surveys, plans and estimates incident thereunto, and all other expenses relating thereunto, and all the residue and remainder of such money for and towards *making, completing and maintaining the said canal, branches, and other the purposes of this act.*"

By the 63d section, "That the said sum of 414,100*l.* or such part thereof as shall be raised by the several persons hereinbefore named, and by such other person or persons who shall or may, at any time within three calendar months from the time this act shall obtain the royal assent, become a subscriber or subscribers to the said navigation, shall be divided and distinguished into 4141 equal parts or shares, at a price not exceeding 100*l.* per share, *and that the shares shall be deemed*

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personal estates, and shall be transmissible as such; and that the said 4141 shares shall be and are hereby vested in the said several subscribers and their several and respective executors, administrators, and assigns, to their and every of their proper use and behoof, proportionally to the sum they and each of them shall severally pay and subscribe thereunto; and all and every the bodies politic and corporate, and all and every person and persons, their several and respective successors, executors, administrators, and assigns, who shall severally subscribe and pay the sum of 100*l.*, or such sum or sums as shall be demanded in lieu thereof, towards carrying on and completing the said intended navigation, shall be entitled to receive, after the said navigation shall be completed, the *entire and neat distribution of one* 4141*th part of the profits and advantages* that shall and may arise and accrue by virtue of the sum and sums of money to be raised, recovered, or received by the authority of this act, and so in proportion for any greater number of shares; and every body corporate or politic, person or persons having such property of a 4141th part or share in the said undertaking, and so in proportion as aforesaid, shall bear and pay an adequate and proportional sum of money towards carrying on the said undertaking in the manner by this act directed and appointed."

The 66th section provides, "That in case the said Company of Proprietors shall be desirous of raising a further sum of 200,000*l.* hereinbefore authorized to be raised, or any part thereof, by mortgage of the said undertaking, then" they may "borrow and take up at interest all or any part of the said further sum or sums, upon the credit of their *said navigation and undertak-*

ing, as to them shall seem fit and convenient, and they are hereby authorized and empowered to assign and make over their said *navigation and undertaking*, and the tolls, rates, and duties arising and to arise by virtue of this act, or any part thereof, as a security for any sum or sums of money so to be borrowed, with interest, to such person or persons, or his, her, or their trustee or trustees, who shall advance the same, under the common seal of the said company, by the following deed," (it then sets forth the form of deed,) " and all and every person and persons to whom such mortgage or mortgages shall be made shall be equally entitled to his, her, or their proportion of the said tolls, rates, duties, and premises, according to the respective sums in such mortgage or mortgages mentioned to be advanced, without any preference by reason of the priority of date of any such mortgage, or on any other account whatsoever; and the money so to be borrowed is hereby directed and appointed to be laid out and applied for and towards the making, completing, and maintaining the said navigation, and the works hereby authorized to be made, and other the purposes of this act."

By the 67th section it is enacted, " That an entry or memorial of every such mortgage, containing the date, names of the parties, and sum of money borrowed, shall, within sixty days next after the date thereof, be entered, gratis, in one or more book or books to be kept for that purpose, by the clerk to the said company of proprietors; which book or books shall and may be perused gratis at all seasonable times by the proprietors or creditors of the said navigation; and every person to whom any such mortgage shall be made, or who shall be entitled to the money thereby secured,

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may from time to time assign or transfer his, her, or their right, title, interest, or benefit, of, in, and to the principal money and interest thereby secured, to any person or persons whomsoever, by any deed or instrument in writing, under his, her, or their hand and seal, and which shall or may be made in the words or to the effect following:—

'I, (or we,) of , in consideration of the sum of paid by of , do hereby transfer a certain mortgage, made by the Company of Proprietors of the Lancaster Canal Navigation, from Kirkby Kendal to West Houghton, to , bearing date the day of , for securing the sum of and interest, and all my (or our) right and property therein, to the said , his (or her) executors, administrators, or assigns. Dated this day of , in the year of our Lord .'

Which said assignments or transfers shall, within sixty days after the date thereof, be produced and notified to the said clerk to the said Company of Proprietors, who shall thereupon cause an entry or memorial to be made thereof, containing the date, names of the parties, and the sums of money thereby transferred, in the said book or books to be kept for entering the said original mortgages; for which last-mentioned entry the said clerk shall be paid the sum of five shillings; and after such entry made every such assignment shall entitle such assignee, his, her, and their executors, administrators, and assigns, to the full benefit of the original mortgage; and every such assignee may in like manner assign again, and so *toties quoties;* and it shall not be in the power of such person or persons who shall have made any such assignments, at any time

afterwards to make void, release, or discharge the original mortgage, or any monies thereby secured, or any part thereof; and the interest of the money so to be borrowed by mortgage as aforesaid shall be paid half-yearly to the several persons entitled thereto, in preference to any interest or dividends due and payable by virtue of this act, to the said Company of Proprietors, or any of them: Provided always, that no person to whom any such mortgage or assignment shall be made or transferred as aforesaid, shall be deemed a proprietor of any share, or capable of acting or voting, either as principal or by proxy, for or on account of having lent or advanced any money on the credit of such mortgage or assignment."

By section 79 it is enacted, "That it shall and may be lawful to and for the several proprietors of the said navigation to sell or dispose of his, her, or their *share or shares therein*, subject to the rules and conditions herein mentioned; and every purchaser shall have a duplicate of the deed of bargain and sale, and conveyance, made unto him or her; and one part of such deed, duly executed by the seller and purchaser, shall be delivered to the said committee or their clerk for the time being, to be filed and kept for the use of the said company, and an entry thereof shall be made in a book or books to be kept by the said clerk for that purpose, for which no more than two shillings and sixpence shall be paid; and the said clerk is hereby required to make such entry accordingly; and until such duplicate of such deed shall be so delivered to the said committee or their clerk, and filed and entered as above directed, such purchaser or purchasers shall have no part or share of the profits of the said naviga-

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tion, nor any interest for his said share, paid unto him, her, or them, or any vote as a proprietor or proprietors."

The 83d section provides also, that the company "are hereby authorized and required from time to time to nominate and appoint, by writing under their hands, a treasurer or treasurers, and one or more receiver or receivers and collector or collectors, and also a clerk to the said Company of Proprietors, taking such security for the due execution of their respective offices as the said Company of Proprietors shall think proper; and such clerk shall, in a proper book or books, enter and keep a true and perfect account of the names and places of abode of the several proprietors of the said intended navigation, and of the several persons who shall from time to time become owners and proprietors of or entitled to any share or shares therein, and of all the other acts, proceedings, and transactions of the said Company of Proprietors," &c.; with power to the proprietors to inspect such books, &c.

The 122d section provides, "That the said Company of Proprietors and their successors shall, and they are hereby required and directed to take a sufficient security, by one or more bond or bonds, in a sufficient penalty or penalties, from their treasurer, receiver, and collector for the time being of the monies to be raised by virtue of this act, for the faithful execution by such treasurer, receiver, and collector, of his and their office and offices respectively."

The following is a copy of the judgment of Lord *Lyndhurst*, C. delivered 5th December 1829.

5th December 1829.

Lord Lyndhurst, C.—There was a case argued some time since of *Brockbank*, re *Dilworth* and Com-

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pany, who were bankers carrying on business in the county of Lancaster. They were treasurers of the Lancaster Canal Company. The Lancaster Canal Company was incorporated by act of parliament in the year 1792. They had the power of purchasing and holding lands for the purpose of that concern as a corporation. They held and now hold real property, and the proceeds arising from that concern are proceeds arising out of a real estate. For the purpose of carrying on the concerns, it became necessary to raise a certain sum of money. That sum of money was raised by subscription for shares, and the shareholders were entitled to be reimbursed, by the provision of the act of parliament, out of the profits of the concern. As the cause therefore thus stands, those profits which the shareholders are entitled to receive, are profits arising out of the real estates. But there is a clause in the act of parliament by which the general law and the general rule in this respect is controlled. By an express provision in the act, couched in the most general terms, it is declared that these shares "shall be considered as personal estate, and transmissible as such." Nothing, as I have observed, can be more general than the terms; but it is contended at the bar, in the first place, that they were to be considered as personal merely for the purpose of transmission to the personal representative of the shareholders: but the words do not authorize such a limited construction. The words are, that they "shall be personal estates, and be transmissible as such." It is contended that they are to be considered as chattels real. On what argument, however, that is founded, I find it difficult to collect; why they should be considered as chattels

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real, or why the legislature, by these words, meant that they should be considered as chattels real, not having so expressed it, I find no means whatever of ascertaining. The persons who are shareholders are absolute holders of the entire interest in the property, whatever that is. The legislature has declared it shall be personal estate, and there is nothing whatever in the act of parliament, that I can discover, at all controlling the effects of that provision. If that be so, the consequence follows, that this property, if held by the bankrupts at the time of their bankruptcy, would have passed to their assignees: but that is not the question in this case. The question is, whether the property was under the order and disposition, not of the bankrupts, (because *Dilworth*, one of the bankrupts, was a shareholder,) and whether this property was under the order or disposition at all of *Dilworth*, as the reputed owner. Now the facts were these: at the time *Dilworth* and the partners became treasurers of the concern they entered into a bond in the penalty of 20,000*l.*, for the purpose of indemnifying the company against any loss which might arise in consequence of their failing properly to account. In addition to this bond, *Dilworth*, who at that time was holder of 345 shares, transferred 300 out of the whole number to the company, and at the same time executed a trust deed, by which the company undertook to pay the dividends of the shares to *Dilworth*, until there should be some default in the accounts of the treasurer; and in case of any default they were to have the power of selling the shares to the extent of making good the deficiency. By the provision of the act of parliament for the transfer of shares a certain course is to be pursued; a particular form of

instrument is to be executed, which is set out in the act of parliament. It is provided that a duplicate shall also be executed, and that that duplicate shall be lodged with the committee, or with the clerk of the committee, and it shall be entered in a book; and that until these forms are complied with, the party is not to be entitled to receive any profits of the shares, or to act as a proprietor. And there is a further provision that the names of the proprietors shall be entered in a book to be kept for that purpose by the clerk of the concern. In this case the provisions were not complied with; an instrument of transfer alone was executed, and that was delivered to the clerk. No duplicate was executed, nor entry made of the execution of the transfer, agreeably with the provision of the act of parliament. No entry whatever was made indicating that *Dilworth* had ceased to be a proprietor; and it is quite obvious, as I collect from the transaction, that it never was intended that he should cease to be the apparent proprietor; it was intended that this should be a mere security in the hands of the company, to be made use of in case of default of the treasurers, and not otherwise. It is perfectly clear, therefore, taking the provision of the act of parliament and the trust deed together, that during the whole of this period and at the time of the bankruptcy, *Dilworth* was entitled to receive the dividends on his shares: it was perfectly clear also, that he was entitled to a vote as a proprietor. There seems, therefore, as far as the public are concerned, to have been no alteration in the apparent situation of *Dilworth;* he had originally been a proprietor of these 300 shares, receiving the dividends, voting as a proprietor; and those transactions which

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took place between him and the company did not at all vary his apparent situation, for he was still on the books of the company as a proprietor. There is no entry of his having made any transfer of his shares, he was still entitled to receive his dividends, and still entitled to vote as a proprietor. I should therefore consider that he had the order and dispositions of this property as the apparent owner, and I think, under the circumstances, the property passed to the assignees.

A case was cited, which at first view, without looking at the act of parliament, is a decision adverse to the opinion I am now pronouncing. The case to which I refer is the case of the *Vauxhall Bridge Company* (*a*). In the act of parliament which established that company there was a clause similar to that contained in the present act. When that case came before the Vice-Chancellor, it is remarkable (according to the report of it) that it was argued by the counsel on both sides, upon the assumption that this was personal property. Not the slightest doubt is thrown upon that question in any part of the argument. It is assumed on one side, and assented to by the other throughout, that it is personal property. After the argument it became necessary to refer a question to the Master, and the question was simply this, namely, what shares were intended to be comprehended in the agreement. The Master made his report, and the case came again before the Court, when the attention of the Court does not appear, by the argument of counsel, to have been directed at all to the general subject. The Court at that time, without having the act of parliament before it, declared the shares to be real estate; and in conse-

(*a*) 1 G. & J. 101.

quence of that, the observations to which I refer were thrown out by the learned judge who presided on the occasion. It does not appear to me therefore that I am oppressed by the weight of that authority. I certainly should feel the weight of it, if I supposed at the time the attention of the Court had been directed to the clause in the act of parliament to which I have adverted. I do not think therefore that that case can be considered, under the circumstances to which I have referred, as governing the case now before the Court. And I am of opinion therefore that these shares, or rather the benefit of these shares, passed to the assignees of the bankrupts.

1st May 1832.

The *Solicitor General*, Mr. *Montagu*, Mr. *Duckworth*, and Mr. *Swanston*, for the petitioners. Two questions arise on the present petition, First. Whether the canal shares are in their nature "goods and chattels" within the meaning of the 21 *Jac.* 1. c. 19 s. 11. Secondly. Taking them *per se* to be so, whether regard being had to the circumstances of the case, there was reputed ownership in the bankrupt, or whether they are not *de facto* taken out of the operation of that section, and a good equitable mortgage made of them to the petitioners.

First. By the 1st section of the canal act *32 Geo. 3.* c. 101. the proprietors therein named, and their successors, are declared to be, "for the purposes of the act, one body politic and corporate, by the name of the Company of Proprietors of the Canal Navigation, and by that name shall have perpetual succession, and shall have a common seal, and by that name shall and may sue and be sued; and also shall and may have power and au-

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thority to purchase lands to them and their successors and assigns for the use of the said navigation, without incurring any of the penalties or forfeitures of the statute of mortmain." It is a clear principle that, without express enactment to the contrary, the lands purchased by the corporation would be real estate. If the shares of the company are of such a nature as to have no connection whatever with land, then indeed they may be goods and chattels within the Bankrupt Act. The shares are strictly real estate, and the only object of the 62d and 63d sections of the act is to limit the conversion of the money into land, declaring that it shall be transmissible as money. They savour of the realty, being interests deducible therefrom, and are to be regarded as such for all purposes, except for the transmission of the shares to personal representatives. If they were not real estate, without the words of the 63d section, for what purposes could those words be introduced into the act? Without them the shares would pass in the same manner as a fee simple: yet for other purposes the act does not render them less real estate. So in the case of perpetual annuities in the Stock Act, without express words to the contrary, they would pass to the heir. The act does not declare that they *shall be* personal estate; but that they *shall be* "*deemed*" personal, and that merely for the purposes of transmission. There may be such a thing as personal estate in land, as for instance, terms for years. Yet they, for however short a duration, are not goods and chattels, but personal, savoring of the realty. If they are personal, of the nature of goods and chattels, they are only choses in action. We admit, that according to the case of *Ryall* and *Rolle* (*a*) choses in action,

(*a*) 1 Atk. 165.

unconnected with land, come within the designation of goods and chattels. But then choses in action are not capable of assignment by law, yet these shares are capable of assignment, and therefore are still real, though by the act transmissible as personal. Can it be contended that these shares are only aliquot shares of the money subscribed? Is not the money sunk in land and deprived altogether of its properties as money? What are the profits? Not the interest of the money, but the produce of the land through and over which the canal runs. Suppose the whole company were broken up, the proprietors would be entitled to an aliquot portion of the land, or the produce of it when sold. And the objects of the Courts has always been to prevent any thing which savours of the realty from coming under the operation of the statute of *James*. That statute has never been extended to property held by title. Goods and chattels, even affected by a trust, have been held not subject to it.

As to the first point the following cases were relied on:—

Rex v. *Bates* (*a*), *Rex* v. *Hull Dock Company* (*b*), *Buckeridge* v. *Ingram* (*c*), *Port* v. *Turton* (*d*), *Rowe* v. *Galliers* (*e*), *Horne* v. *Baker* (*f*), *Jones* v. *Gibbons* (*g*), *Thornborough* v. *Baker* (*h*), *Knapp* v. *Williams* (*i*), *Finch* v. *Squire* (*k*).

Second. We contend the reputed ownership in these shares was not in the bankrupt. They are not wares, goods and chattels, like goods in a man's shop, capable of misleading the public, which it was the object of the

(*a*) 3 Pri. 341. (*b*) 1 T. R. 219. (*c*) 2 Ves. J. 651.
(*d*) 2 Wils. (Serjt.) 169. (*e*) 2 T. R. 133. (*f*) 9 East, 215.
(*g*) 9 Ves. 407. (*h*) 3 Swan. 628. (*i*) 4 Ves. 430, in note.
(*k*) 10 Ves. 41.

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legislature to prevent. Nor are they transmissible in the way of goods and chattels; but, on the contrary, they require all the solemnity of deeds to pass them. Besides which, the company, (as far as these shares, which are, strictly speaking, mere untangible, incorporeal rights, are capable of actual possession,) were the persons in possession of the property, and *Dilworth* could not be reputed owner of such incorporeal rights in such a manner as to deceive the public as to the extent of credit to be placed on his means in consequence of them, as the statute requires. The receipt of dividends could not make him the reputed owner of the shares, for that must have been unknown to the world; any person might by enquiry at the office of the company have ascertained who was the true owner. It is said that the provisions of this act, pointing out the mode of transfer, have not been complied with, and therefore that no interest passes to the petitioners. The act provides for the assignment to third persons, but prescribes no particular mode of transfer to the company themselves. [*Lord Chancellor.* Surely does not that come within the 79th section?] We contend not. Our view of the statute is, that the forms were required merely as an indemnity to the company, and for their safety alone inserted in the act. If, however, in a transaction, wherein they were personally concerned, they choose to forego the compliance with these forms, they were at liberty to do so, and are not to be affected by such omission, which cannot affect the public at large. At all events no such form is expressly required in such case by the act; and as the company are not incapacitated from taking any share to itself (*a*), the

(*a*) See *Nelson* v. *London Assurance Company*, 2 Sim. & S. 292.

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ordinary rules of law ought alone to be resorted to as governing this transaction. Therefore, we contend that a failure in that form of transfer which was prescribed for other transferees, in order that the company might have notice of it, cannot affect the company. Suppose then for the sake of argument, these shares to be a chose in action, can it be contended that an assignment of a chose in action prior to bankruptcy is not good, where notice is given to the debtor? Here the company itself is the debtor in respect of the dividends payable on the shares, and therefore manifestly have notice of their own acts. Look also to the words of the 66th section; the mortgagee under this section would take an interest in land, and yet the conveyance is to the executors of the mortgagee. Now if the company had mortgaged the whole concern, the mortgagee would not take the property as goods and chattels, but evidently as an interest in land, and out of the words of the 72d section of the Bankrupt Act. And if the whole would pass as land, why should a part of the whole pass in a different manner, as goods and chattels? Again: suppose any party had devised these shares to a charity, would not the devise come within the mortmain acts as savouring of the realty and as being an interest in land, and therefore bad? Again: the case of the *Vauxhall Bridge Company* (*a*) is precisely similar to the present, except by the introduction of the words "and not of the nature of the realty," and that case was decided in our favour. [Lord *Brougham.* I cannot conceive that the V. C. in that case had his attention particularly called to that addition, otherwise his judgment goes too far.] Even supposing that according to the 79th section no interest

(*a*) 1 G. & J. 101.

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in the profits will pass to the company till the forms are complied with; yet an assignee must have an interest in the property, if not in the profits, and all we here contend for is, the advantage of an equitable mortgage.

In *Nelson* v. *London Assurance Company* (*a*) where it was held that the company had no lien, there was a clause in their charter, that till some order or resolution of the directors to the contrary, the proprietor should be allowed to receive the dividends, and to sell and transfer: there being therefore no such order or resolution, how could the company have a lien against the terms of their own charter? That case cannot govern the present, for in this a formal transfer of his interest has been made by the individual shareholder.

The form required by the act was merely to give to the company itself notice of the transaction. It is not the formality or informality of the mode of transmission that is to govern the validity of it, but the sufficiency or insufficiency of the notice that is given. If the informality of transfer be accompanied with notice, the transaction will be binding; but however formal, if there be no notice it must be invalid. Here the notice was complete, the company being at one and the same time, the parties liable to pay the dividends on the shares, and the transferee of the interest in them.

As to the second point, the following cases were also cited:—

Greening v. *Clarke* (*b*), *Lucas* v. *Dorrien* (*c*). *Row* v. *Dawson* (*d*), *Yates* v. *Groves* (*e*), *Ryall* v. *Rolle* (*f*), *Gordon* v. *East India Company* (*g*).

(*a*) 2 Sim. & S. 292. (*b*) 4 B. & C. 316. (*c*) 7 Taunt. 278.
(*d*) 1 Ves. Sen. 331. (*e*) 1 Ves. J. 280. (*f*) 1 Ves. Sen. 374.
(*g*) 7 T. R. 228.

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Sir *E. B. Sugden*, Mr. *Knight*, and Mr. *Geldart*, for the assignees. If the argument on the other side be good as to the nature of the property in the shares in question, viz. that it is real, then in the case of every corporation that is possessed of realty, each individual corporator would be possessed of real estate. He would in right of it be entitled to vote in elections for parliament, and qualified to sport and to exercise all the rights attaching to real property. But it would be as great an absurdity to suppose he could have such rights, as to contend that he could enter and enjoy or grant leases of the land. On the contrary, even if he go upon the land, (or in this case, on the towing-path,) he is liable as a trespasser; yet who ever heard of a man being a trespasser on his own property? The real estate is possessed by *all* the corporators, quasi a corporation, which alone, *as a body*, and not the component members of it, has the seisin of the estates; and we contend that even if there had been no such words in this act of parliament, the heir could not have taken. The words of the act as applicable to the rights of transfer by an individual shareholder, are "*his share*"(*a*), but when the corporation is authorized to mortgage, &c. and only then, the words used are "the *navigation and undertaking*," meaning the real estate(*b*). The corporation has the fee simple, and the individuals only the shares in the profits. An individual cannot put an end to the concern and claim his share in the land. But if the individuals possess the fee simple, have they not all the rights attaching on real estate as tenants in common? Here, however, by the act itself, upon certain conditions, namely, the payment of tolls, the public

(*a*) Sec. 79. (*b*) Sec. 66.

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have as much right to navigate and to enjoy the land as any individual shareholder can have.

As to this being a chattel real. It is well settled that a chattel real can only exist for a definite period. Its definition in Bla. Com. (*a*) is, they "are such as concern or savour of the realty, being interests issuing out of or annexed to real estates, having the quality of immobility, which denominates them *real*, but wanting the other, viz. a sufficient legal indeterminable duration; the want of which constitutes them chattels. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income." If a grant of land is for a thousand years, it is then even a mere chattel. [Lord *Brougham*. Or if for so long as grass grows or rain falls.] But it cannot be for an indefinite period. There must be a reversion in fee in some person. Yet these shares have no such properties; the property of them is indefinite, and therefore, as it cannot be contended that they can rank higher than chattels real, they must fall in the scale of the legal divisions of property, and be placed under the denomination of mere personal chattels. The statute declares them to be personal, and the words "and shall be transmissible as such," are only added to strengthen and not to weaken that declaration.

The question whether or not these shares would come within the mortmain act does not apply. If that doctrine would apply, then for the same reason a legacy issuing out of land would not come within the Bankrupt Act.

(*a*) Vol. ii. p. 386.

Besides, if they were real estate, then a prerogative probate would be necessary in case of a will concerning them; but in *Ex parte Horne* (*a*), Lord *Tenterden* has decided that they are personal and that therefore a consistorial probate is sufficient.

As to the second question, none of the forms required by the Canal act have been complied with, to render the transferee of these shares the true owner. There is no entry of the transaction in the books of the company. The bankrupt's name stands unaltered as a proprietor of them in the dividend book. The mere notice which the company possessed is not sufficient to do away with the enactments of the statute; and it is not to be supposed that the company would have regarded this as a binding transaction against them had the transferee been a stranger. By the whole nature of the transaction there is nothing which takes from the bankrupt the delusive credit he obtained as the supposed proprietor of the shares, and therefore they must pass to his assignees. *Lingham* v. *Biggs* (*b*), *Dearle* v. *Hall* (*c*), *Longman* v. *Tripp* (*d*).

The *Solicitor General* in reply stated, that as a fact, he knew that the point in question was discussed in the *Vauxhall Bridge Case*, and was fully before the Court, and that a case for his opinion had been laid before Mr. *Bell*, who was the counsel for the assignees, in which he gave an opinion that the shares were not within the statute, and therefore he would not advise an appeal.

Even admitting that there was a reputed ownership,

(*a*) 7 B. & C. 632.
(*b*) 1 Bos. & Pull. 82.
(*c*) 3 Russ. 1.
(*d*) 2 B. & P. New Rep. 67.

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yet he contended that it was capable of a trust. The party receiving the dividends might be a mere trustee. And supposing, for instance, these shares had been the subject of a settlement, then it was clear the assignees could not take them. In such case the parties would stand in precisely the same relation as in this, and the property could not pass to the assignees.

His Lordship took time to consider his judgment.

Lord CHANCELLOR.—In this case I shall affirm the judgment of Lord *Lyndhurst*, which is appealed from. The Solicitor General was kind enough to hand me up a case laid before Mr. *Bell*. I thought at the time the Solicitor General read it, that the 3d section of the Vauxhall Bridge Act had not been before His Honor the present Master of the Rolls. On reading the case myself, I am quite convinced it had not been brought before His Honor. This is quite clear from the report of what fell from His Honor on that occasion. It does not support the decision of the *Vauxhall Bridge Case* which goes a great deal too far (and must be independent of that clause); it goes to this, that if there are shares of a trading company, and that trading company is possessed of an acre of real property, if it is a house where they carry on their business, or a cart-lodge next to the house, if th y are seised of any real property, the shares of each proprietor are not within the statute, but are excluded altogether.

The petition was dismissed with costs (*a*).

(*a*) It is much to be regretted that the learned judge gave no further reasons for his decision in a case of so much importance to the mercantile world.

It will be remembered that it was decided at the moment when that learned judge had for a short time resigned the Great Seal, and little time was left for him to give judgment in many other important matters which had in like manner been heard before him.

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Ex parte WILLIAM BENSON.—In the matter of JOHN DILWORTH, MORLEY ARTHINGTON, and ROBERT BIRKETT.

Coram Lord Chancellor, May 3 & 4.

THIS was a petition of appeal from an order of the Vice-Chancellor, made on the 21st day of October 1828, which directed that the petition should be dismissed, and that the present petitioners should pay the respondents, the assignees, their costs (*a*).

The bankrupts in this case, in the month of February 1826, carried on the business of bankers at Lancaster, and *Barclay* & Co. were their agents in London, who were in the habit of advancing money to the bankrupts in the way of their business; so that in December 1825 a large balance was due to them by the bankrupts. At that time, *Barclay* & Co., upon a request for further advances, required additional security for the then present and future advances. It also appeared that the bankrupts had been in the habit of receiving from

A. was in the habit of indorsing and paying into his country banker, *B.*'s hands, bills not due, which were entered by *B.* in the pass book as bills to his credit to the full amount. By the custom of the bank the customers were at liberty to draw for the amount of such bills immediately, and the bank was at liberty to pay away such bills as they thought fit. There was no evidence of *A.*'s knowledge of this custom, and *A.* swore that he never gave authority to *B.* to negotiate them, but deposited them only that *B.* might receive the value when at maturity; that he never drew on account of any bill till after it was due; that the balance of accounts, independent of the bills, was always in his favour; and that he never received more than one such bill (deposited by another customer) in answer to his cheques. *B.* having negotiated them to *C.* as a security for a debt, and *B.* becoming bankrupt before the bills were due:—Held, that they did not pass to *B.*'s assignees, and therefore *A.* was entitled to be indemnified from the surplus security in the hands of *C.*

(*a*) The facts of this case are similar to those in *Ex parte Thompson*, 1 Mont. & M. 102, which was in the same bankruptcy, and this case was considered at that time as governed by the decision of the V. C. there given, and was one of the three petitions mentioned at the end of that report as decided accordingly.

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their customers (and among others, from the petitioner) short bills, and indorsing them over to *Barclay* & Co. as a security for their debt.

At the time of paying the bill of exchange in question into the house of the bankrupts, and up to the time of their bankruptcy, the bankrupts were considerably indebted to the petitioner, he never having had any advance of money by them over and above his funds in their hands, but on the contrary, having always had a balance due to him from them. The bill in question was paid into the bank by the petitioner on the 24th December 1825, being drawn for 140*l.* 10*s.* on the 19th November 1825 by one *Green*, at three months, in favour of *Battersby*, upon *Jones*, *Lloyd* & Co. of London; and indorsed to the petitioner, by whom it was deposited in the hands of the bankrupts for the purpose of their obtaining the payment of it on account of the petitioner when it became due; and, as the petition alleged, the bankrupts had no authority to deposit or pledge the bill, nor to dispose of it for any other purposes. The bankrupts, however, remitted the bill to *Barclay* & Co. who received the proceeds when due, after the bankruptcy, and carried the amount of it to the credit side of the bankrupts' account. The petitioner demanded payment of the bill from the assignees, which was refused.

The original petition prayed that it might be declared that, after satisfying the previous lien, if any, of *Barclay* & Co., the petitioner was entitled out of the proceeds of the securities belonging to the bankrupts in the hands of *Barclay* & Co. at the time of the bankruptcy, to be paid the amount of the bill in question, with interest from the time when the amount of it was

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received by *Barclay* & Co. and applied by them in reduction of the debt due to them from the bankrupt; and with liberty to prove for the deficiency.

The affidavits in support of the original petition stated, that the balance of the cash account between the petitioner and the bankrupts, had always been in favour of the petitioner. That at the time when he paid any bills into the bank, they were specifically entered as bills in the pass books, and distinguished from cash payments. That the petitioner never gave authority to the bankrupts to discount them, and he was entirely ignorant of such authority being given by the bankrupts to *Barclay* & Co. That the bills were only deposited as bills of which the bankrupts were to receive the amount when due. That the petitioner had never drawn on the bank on account of any bills paid in by him, until after the same became respectively due.

The affidavits in opposition stated, that when the bills were paid in, the customer was always at liberty to draw to the full amount of the bills before they became due. These bills were also, by a general custom of the bank and of all Lancaster banks, paid away to customers generally as cash, in answer to their cheques.

Mr. *Spence*, and Mr. *Booth*, for the appellants. This case is in all its circumstances similar to *Ex parte Armitstead* (*a*), and *Thompson* v. *Giles* (*b*) and ought to receive a similar decision. Without positive proof on the part of the bankers of the assent of the customer that they should negotiate the bill in question, they could have no right to do so. Here too, the cash

(*a*) 2 Glynn & J. 371. (*b*) 2 B. & C. 422.

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balance always being in favour of the petitioner, and he never having drawn on account of any bill deposited by him till its arrival at maturity, the bankrupts could acquire no species of right to the bills to entitle them to negotiate them to a third party. In the case of *Ex parte Thompson* (*a*) there did not appear to have been any cash payments by the customer, but all his transactions were carried on by short bills, and unless that fact were sufficient to distinguish it from *Ex parte Armitstead*, and from this case, it could not be considered as a case of any authority after the decision of Lord *Lyndhurst* in *Ex parte Armitstead*.

Sir *E. Sugden*, and Mr. *Geldart*, for the respondents, the assignees. Besides the general custom of bankers, and the right of the customer, to draw on the bills as soon as they are paid in and before their arrival at maturity, being sufficient to establish the right of the bankers to negotiate them, there is no reason why the customer should have a right to follow the bills into the hands of third parties, or to claim them against the assignees, any more than if they had been so many bank-notes. When paid into the bank they were regularly indorsed by the petitioner, which *primâ facie* gave the bankers a right to negotiate them. The petitioner had taken some short bills, deposited by other persons, in payment of his cheque, and therefore must have been aware of the custom, and ought to be bound by it. He might have been entitled to the delivery up of the bills had he ever given instructions not to negotiate them; that however he had never done: or if they had been remitted to the bankrupts for any particular purpose,

(*a*) 1 Mont. & M. 102.

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for which they were ultimately never required, he might have recovered them; but that is not the present case. The fact also of the bills being indorsed by the petitioner on depositing them, evinces the intent that they should be rendered negotiable, or else for what purpose could such an indorsement be made? This case comes within the principal of *Ex parte Sargeant* (*a*), from these circumstances of proof of the knowledge in the customer of the general method in which the bankrupts carried on their dealings in respect to short bills.

Mr. *Spence*, in reply. In this case there appears in fact to have been but one payment of a cheque by a short bill of this description, and the receipt of that alone is not sufficient to indicate any knowledge of the custom. Upon the receipt of that bill, the petitioner became a *bonâ fide* holder, and was entitled to avail himself of it accordingly. He was not bound to inquire into the manner by which the bankrupt acquired the possession of it, or investigate their title to negotiate it. The case of *Ex parte Thompson* has been virtually overruled, as being irreconcilable with *Ex parte Sargeant* and *Ex parte Armitstead*, unless the facts distinguish it from these latter cases.

The *Lord Chancellor*.—I feel great difficulty in distinguishing the case of *Thompson* v. *Giles*, as adopted and affirmed by Lord *Lyndhurst*, from the principle on which the present case is put. One of the learned judges (*b*) in *Thompson* v. *Giles* seems to have been disposed to consider it as a question of fact: but Mr. Justice *Holroyd* thought differently, and that it

(*a*) 1 Rose, 153. (*b*) Mr. Justice Bayley.

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was a question of law. I do not mean that he actually says so, but from an observation he makes, he considers it as establishing a proposition in point of law. It did not go further than the case of *Giles* v. *Perkins*(*a*). It has been said that *Thompson* v. *Giles* went further than *Giles* v. *Perkins*, though in fact *Giles* v. *Perkins* was a stronger case: but since the case of *Giles* v. *Perkins*, we have the dictum of Lord *Eldon* in *Ex parte Sargeant*, and it is not very difficult to reconcile this with Lord *Ellenborough*'s decision in *Giles* v. *Perkins*. The difference between *Giles* v. *Perkins* and *Thompson* v. *Giles* is, that the former does not appear to have received much consideration by the Court. The contrary is the fact with respect to the latter case; for *Thompson* v. *Giles* appears to have received much consideration. There is, I think, a difference, and a material difference, between the case of *Ex parte Sargeant* and the present case; and there is a difference again between the cases of *Ex parte Sargeant* and *Thompson* v. *Giles*. Mr. Baron *Bayley* refers to it in his judgment. The case of *Mason* v. *Giles* has also been referred to, and as there seems to have been some little doubt whether or not the facts which have been stated to exist in it are to be found in the special case as ultimately admitted by the parties, I think that would be better decided by reference to the paper books. I shall take an opportunity of seeing how the facts are there mentioned. *Thompson* v. *Giles* appears to have been considered as overruling that case from an additional fact (if it was additional) which caused it to differ from it. I certainly feel there is a difference between the present case and *Ex parte Thompson*. At the

(*a*) 9 East, 13.

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same time I do not see how *Ex parte Thompson* can be severed in principle from *Thompson* v. *Giles* and *Ex parte Armitstead*. I think it is much more clear to distinguish between that case and these two cases, than that there should be a perfect discrepancy in the judgments. The case is of considerable importance. I shall therefore look at the affidavits before I ultimately decide.

With respect to the costs, I do not think I can give the appellants the costs of this appeal. The assignees representing the estate were bound to come forward. They have not been put in possession of any judgment of the Commissioners, and, therefore, must have their costs out of the estate.

The Lord Chancellor took time to consider his judgment.

May 12.

The Lord Chancellor reversed the order of the Vice-Chancellor, but without costs. The costs of the assignees to be paid out of the estate (*a*).

(*a*) The same observations apply to this case as contained in the note, *ante*, pp. 434, 435, this case having been similarly circumstanced.

Ex parte GEORGE SMITH and ARTHUR WILCOXON.—In the matter of SAMUEL HARRISON and FREDERICK HENRY GRAHAM.

Court of Review, May 2.

Contrary to the old practice, the Court will not, in general, refer it to the Commissioner to ascertain the existence of an equitable mortgage, but will themselves decide the question.

THE commission in this case issued on the 28th February 1832, under which *Bodam Smith* and *William Hurst* were chosen assignees. On the 1st October 1831, the petitioners agreed to advance to the bankrupts 300*l*., for securing which, the bankrupts were to give to petitioners their joint and several bond and warrant of attorney to confess judgment thereon, and,

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Ex parte Smith and another.

as alleged by the petitioner, to deliver to the petitioners, by way of equitable mortgage, the lease of their house and premises in Alfred Place. The advance was made, and the bond executed, and the lease deposited at a subsequent period in the latter end of the month of October 1831.

The petition proceeded to pray that a meeting might be held before the Commissioner named in the fiat, and that at such meeting the Commissioner might be directed to enquire and ascertain, whether, the petitioners were equitable mortgagees of the bankrupt's interest in the said lease and premises, and if they should be declared to be so, then the usual directions in cases of equitable mortgages.

Mr. *E. Chitty* for the petitioners.

Mr. *Flather* for the assignees appeared to consent, but,

The Court said that they would themselves decide in all cases as to the validity of an equitable mortgage. Although the practice had been hitherto in conformity to the prayer of this petition; yet, that practice had crept in improperly from the press of business under the old bankruptcy jurisdiction and must be altered for the future.

The petition therefore stood over, in order to file affidavits.

Ex parte ROBERT THOMAS.—In the matter of ROBERT THOMAS.

1832.

May 5.

On petition presented to L. C. before 11th January 1832, to supersede, an action at law was directed to try validity of commission, costs reserved. Verdict in favour of petitioner. A new petition was thereupon presented to C. R. and granted:—Held, petitioner was entitled to costs of both petitions, and that C. R. had no jurisdiction in question where the petitioning creditor could set off the debt really due to him against those costs.

Exp. Billiards, *Exp. Edwards*, and *Exp. Marks* overruled.

IN this case an order had been made upon a petition addressed to the Lord Chancellor on the 9th of January last by his Honor the Vice Chancellor directing that the petitioner should be at liberty to bring an action against the assignee to try the validity of a commission issued against him, and the question of costs of all parties was reserved until a day named after the present Easter term, with liberty to apply. The petitioner brought his action and obtained a verdict in his favour. The Bankrupt Court Act coming into operation, the petitioner presented a new petition to this Court, in the same form as the original petition, praying for a supersedeas, which came on this day, and the only question was, as to the costs of the petition to the Lord Chancellor, and of the present petition to this Court, which were prayed against the petitioning creditor and the assignee.

Mr. *Montagu* and Mr. *Wilbraham* for the petitioner.

Mr. *Munro* for the respondents contended, that according to the cases of *Ex parte Billiard* (*a*), *Ex parte Edwards* (*b*), *Ex parte Marks* (*c*) the petitioner was not entitled to costs of the former petition to supersede, as he might have brought his action in the first instance to try the validity of the commission; and at least he was not entitled to the additional costs of the new petition. The petitioning creditor had also a right to set

(*a*) Buck, 220. (*b*) *Ibid.* 232. (*c*) 1 G. & J. 70.

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off the debt due to him by the bankrupt against these costs.

Sir G. ROSE.—The cases cited have been long overruled in practice, and indirectly so by Lord *Eldon* in *Ex parte Greenway* (*a*). Since then, there has been no doubt upon this subject, and it has become a universal rule to give the party succeeding in an action to supersede, the costs he had been put to. If the original petition had been presented to this Court, then, indeed, the costs of the new petition would be properly refused to the petitioner, but here the original petition was presented to the Lord Chancellor, upon which this Court could not have acted. Therefore, the amendment of it was perfectly correct. As to the question of set-off, the Court have no jurisdiction to enter upon it on this petition.

The other Judges concurring,

The petition for a supersedeas was granted, with costs against the petitioning creditor and the assignee. The costs of the solicitor to the commission also to be paid by them.

(*a*) Buck, 412, 420.

Ex parte FREDERICK JOHN NASH, THOMAS USBORNE and BENJAMIN WOOD, claiming to be assignees, and others, creditors of the bankrupts.—In the matter of GEORGE WYATT and HENRY THOMPSON, bankrupts.

1832.

May 10, 11, 12.

Creditors having, subsequent to the appointment, signed resolutions authorizing the assignees to do certain acts, *as assignees*, which they could not have performed without such authority, and to act generally as assignees, are debarred from questioning the validity of the appointment at a subsequent period, upon grounds of which they were aware at the time of signature.

Semble, that a creditor who has proved, is entitled to vote in the choice of assignees, if he apply before the Commissioner has signed the declaration of appointment, although the Commissioner had previously verbally declared the choice complete.

Semble, also, that the appointment is not complete till the declaration of appointment is signed by the Commissioner.

THIS was a petition relative to the due election of assignees. The facts were, that at a meeting of creditors appointed for the proof of debts, and for the choice of assignees, all the creditors then present, except *Samuel Adams* and *Glyn*, signed the usual memorandum for the nomination of the petitioners *Nash*, *Usborne* and *Wood* as assignees. Mr. *Glyn* was also applied to to sign it, but refused. *Glyn* was requested to subscribe another memorandum, signed by *Adams* alone, and by which *Adams* nominated as assignees *William Cater* and *Robert Morecock*, (who were in fact the assignees ultimately adopted and appointed by the Commissioner); *Glyn*, however, refused to sign this, and left the meeting, declaring he would not vote at all in the choice. The meeting took place at 12 o'clock on the 20th of January, and *Glyn* left the meeting about 2 o'clock. The business of the meeting proceeded till 4 o'clock, when all the creditors of the bankrupts then present, who were entitled to vote in the choice of assignees, having voted, the Commissioner said, that the choice of assignees was ended, and he required the lists or memorandums in favour of the respective nominations of assignees to be handed to him, in order that the same might be called over, and that he might certify on whom the choice had fallen. The memorandum signed by *Adams* was signed by no other creditor, and his debts thereon amounted to

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27,419*l.* 9*s.* 11*d.*, whilst the debts of the creditors who signed the other memorandum, nominating the petitioners, amounted to 28,562*l.* 9*s.* 5*d.* Mr. *Smith*, the petitioning creditor and solicitor to the commission and to *Adams*, purposely (as stated in the petition) delayed the meeting for some time, and in the meantime sent to Mr. *Glyn* to urge his return, in order to vote with *Adams* in favour of *Cater* and *Morecock*, whose debt, when added to *Wyatt*'s, exceeded the other creditors by 232*l.* 15*s.* 6*d.* Mr. *Glyn* returned to the meeting about twenty minutes after 4 o'clock, and signed the memorandum in favour of *Cater* and *Morecock*, which was then tendered to the Commissioner. It was objected, on behalf of the other creditors, that *Glyn* ought not to be allowed to sign the memorandum, inasmuch as the Commissioner had, at 4 o'clock, declared the choice was ended, and that the petitioners had been properly chosen; but the Commissioner decided that *Glyn* was entitled to vote, and declared that *Cater* and *Morecock* were duly chosen assignees.

The petition prayed, that the petitioners might be declared duly chosen assignees, and that *Cater* and *Morecock* might be ordered to deliver up to the petitioners the commission and proceedings, and the estate and effects of the bankrupt, (and other similar incidental directions,) or that a new choice might take place.

The affidavits in support of and in opposition to the petition also stated that the Commissioner had, in a prior part of the day, stated that the meeting would terminate at 4 o'clock, and before the return of *Glyn*, the Commissioner after looking over the two memorandums, rejected the one signed by *Adams*, and holding

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up the other, said, "this is the choice." At the moment that the Commissioner was about to sign the last mentioned memorandum, *Glyn* however returned and signed the rejected memorandum.

The Commissioner had not finally determined or decided upon the choice of assignees, nor signed any choice previous to *Glyn* signing the nomination in favour of *Cater* and *Morecock;* but upon *Glyn* so signing the same, the Commissioner allowed it, and placed his signature in the margin, signifying his approval thereof, and declared *Cater* and *Morecock* to be duly chosen and elected assignees under the commission, and appointed the official assignee to act with them. A memorandum to that effect was also entered by the Registrar in his book.

Resolutions of creditors.

It appeared that some time subsequent to *Cater* and *Morecock* being declared assignees by the Commissioner, all the petitioners had signed a memorandum, whereby they authorized *Cater* and *Morecock*, as assignees, to do various particular acts in the management of the estate, such as the payment of bills, &c., and also to act generally for the benefit of the estate; whereby the petitioners had fully recognized them as the assignees. Notwithstanding this, about a fortnight after, they presented the present petition with a view to re-open the choice of assignees.

Mr. *Swanston* and Mr. *Wigram*, for the petitioners, contended that the choice of assignees being the act of the creditors, is complete as soon as the major part in value have nominated him; and on such nomination the Lord Chancellor would, under the law as it stood prior to the 1 & 2 *Will.* 4. c. 56. have compelled the

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Commissioner to execute the assignment; *Ex parte Woolley* (*a*). When the Commissioner had declared "this is the choice," the choice was complete, and the meeting, as respected the choice of assignees, was ended. The estate from that moment, under the new act (*b*), vested in such assignees, and it was incompetent to the Commissioner afterwards to recall his declaration, so as to re-open the choice.

Mr. *Montagu* and Mr. *Jacob* for the assignees, *Cater* and *Morecock*. In *Ex parte Woolley*, if the debt sought to be proved would have turned the choice of the assignees, then the meeting would have been adjourned and the choice opened; therefore that case rather tends to support our's. By the 1 & 2 *Geo.* 4. c. 56. s. 25., the estate vests on the appointment, and that appointment cannot have taken place till the Commissioner has signed and sealed the memorandum. The termination of the meeting is solely in the power of the Commissioner, and therefore we contend that the choice of our clients being signed and duly authenticated by the Commissioner, cannot now be opened upon such grounds.

May 12.

Mr. *Swanston* in reply. During the meeting the Commissioner had announced that it would end at four o'clock. At that hour all the creditors present, who were entitled to do so, had proved their debts, and voted in the choice of the assignees. The Commissioner then called for the lists, and, referring to the appointment of the petitioners, declared, "this is the choice." At this moment, therefore, the choice was

(*a*) 1 G. & J. 366. (*b*) 1 & 2 *W.* 4. c. 56. s. 25, 26.

conclusive and complete, and it was not competent to the Commissioner, who is a mere ministerial officer, afterwards to re-open the choice. Put the case of a parliamentary election. It has often been decided by Committees of the House of Commons to the effect for which I argue; viz. that the returning officer declaring a party duly elected becomes from that moment *functus officio*, and incompetent therefore to re-open the election (*a*). [*Pell*, J. The decisions of committees are not the decisions of a Court of law, and we cannot be bound by them. *Rose*, J. If the Commissioner were merely a ministerial officer, like the returning officer in an election, then his first declaration might have bound him; but the Commissioner is in fact both a ministerial and judicial officer, and therefore it is otherwise.] I contend that, according to the act of parliament, his office in this respect is merely ministerial. He has no controul over the choice by the creditors; and as soon as the assignees are chosen by them they are immediately identified as such, and hold the office. The memorandum of the Commissioner merely authenticates the appointment. The 6 *Geo.* 4. c. 16. s. 61. confers a power on the Commissioner to reject the choice on certain grounds, but on those grounds only; and no act of his is required to give effect to the choice by the creditors. Besides, the power to reject is only to be applied after the choice is made, if the party chosen be unfit, and on such rejection a new choice must take place. The Commissioner has power to "appoint" a provisional assignee, but none over the particular assignees: the words of the two sections of the act are very different (*b*). Suppose *Glyn* had not appeared,

Decisions of Committees of the House of Commons in cases of election, no authority in Courts of law.

(*a*) Glanv. Elec. Ca. 71.

(*b*) 6 *Geo.* 4. c. 16. s. 45 and 63.

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and the meeting had adjourned, and nothing more had taken place, and no document had been signed by the Commissioner, can there be a doubt but that the estate would have vested in the assignees first chosen? The estate vested in them at the moment of the last signature of the creditors being attached. The statute says, the estate vests on the appointment of assignees. The appointment is by the creditors, and not by the certificate of the Commissioner. The estate passes on the appointment, and having once passed cannot be taken out of the assignees but by an entire new choice. Besides, the declaration of the Commissioner is equivalent to his actual signature. No one pretends that his act must be under seal, and a verbal acknowledgment is equivalent to a written one. In *Ex parte Woolley* (*a*) Lord *Eldon* was evidently of opinion that the choice of the assignees was complete, though the Commissioner had done no act confirmatory of it.

ERSKINE, C. J.—Before the 6 *Geo.* 4 nothing was necessary towards the choice of assignees but the act of the creditors. As soon as that was declared, the Commissioner, as a matter of course, was bound to execute the assignment to the assignees. By the 6 *Geo.* 4 a power is given to the Commissioner to reject assignees, if they are unfit, in his judgment, to hold the office. But yet that power must only be exercised after the choice. By the 1 & 2 *Will.* 4, a new term is altogether used. There the estate vests without assignment "on the appointment," and of course the estate vests from the date of that appointment; and the question is, what is the appointment? Suppose that,

(*a*) 1 G. & J. 366.

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before the appointment is complete, the ratification of the Commissioner is necessary; yet the choice must be complete before such ratification can take place, in the same way as before the exercise of the power of rejection. But I think we have nothing to do with that question; for the creditors had power to prove, and consequently to act in the choice during the whole of the meeting. The duration of it, in my opinion, rested entirely on the judgment of the Commissioner; and when I find that he has signed the formal certificate of the appointment of the assignees *de facto*, I rather rest my judgment on that than the mere informal declaration of the meeting being ended in favour of the petitioners. I therefore think that this petition must be dismissed; and, as the circumstance of the resolutions of the creditors, adopting *Cater* and *Morecock* as assignees, has come before us, it must be dismissed with costs.

Sir A. PELL.—I think the observations of the counsel in support of the petition deserving of great weight,—that it is the office of the creditors to appoint the assignees, and not of the Commissioner. The whole difficulty in this case has occurred by the introduction into the 1 & 2 *Will.* 4. of the word "appointment" in contradistinction to the word "chosen." But I do not feel it necessary to go into the act. I admit that great danger may arise if an electing officer, having declared a choice made, can afterwards recall his words. If the case had ended there, I am not prepared to say but what my judgment might have been different. But I think the subsequent signature of the resolutions of the creditors binds them, and that the assignees appointed

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de facto must now be considered as remaining so *de jure*.

Sir J. Cross.—I think the duration of the meeting and the election of the assignees was in the breast of the Commissioner during the meeting, just in the same way as a record is under the controul of a Court of common law during the whole of the term in which it is entered. I go further than their Honors who have preceded me, for I think the choice or nomination of the assignees is the act of the creditors, but the appointment is the act of the Commissioner.

Sir G. Rose.—I cannot regard the Commissioner as a mere returning officer, but think he had a discretion in the appointment during the whole of the meeting. I concur, therefore, with the rest of the Court in the judgment, that the respondents are duly elected.

The petition was therefore dismissed, and with costs.

Ex parte Clarke.—In the matter of Sewerkrop.

May 11.

Motion to postpone petition in paper of the day, heard in precedence of paper though opposed.

PRACTICE. On the application of Mr. *Bethell* it was held, that a motion to postpone the hearing of a petition which stood in the day's paper, of which motion notice had been given the day previous, will be heard at the sitting of the Court in precedence of the petitions in the paper of the day, although it be opposed (*a*).

(*a*) See *ante*, 396.

Ex parte BOWDEN and ABBOTT.—In the matter of JOHN BUSH.

1832.

May 11.

Quære whether adjudication need be inrolled under 6 *G.* 4. and 1 & 2 *W.* 4. in order to be evidence on a trial at nisi prius, but to avoid the difficulty the Court allowed the assignees to have the proceedings in order to inrol the adjudication(*a*).

MR. *J. P. COBBETT*, who had made a similar application to the Court on a former day, now applied on motion *ex parte*, for an order to permit the assignees to have a loan of the adjudication under this bankruptcy, for the purpose of its being inrolled, in compliance with the 6 *Geo.* 4. c. 16. s. 95. 96. The assignees in this case had brought an action in the Court of Common Pleas, in support of which it would be necessary that the proceedings should be adduced at Nisi Prius, as evidence of the bankruptcy.

The COURT, on the former application, doubted the necessity of having any part of the proceedings inrolled in the way required by the act of 6 *Geo.* 4., the proceedings in this bankruptcy having taken place subsequently to the institution of this Court, and the proceedings being now of record by the act, could not require any thing in addition to their character *as records* to make them receivable in evidence at common law.

Mr. *Cobbett* submitted that this was no sufficient ground for refusing the application. For, assuming all proceedings in bankruptcy under a *fiat* to be records of the Court of Review, it did not necessarily follow that the inrolment clause of the 6 *Geo.* 4. should be considered as dispensed with; and if the assignees were

(*a*) This doubt is now set at rest by the statute 2 & 3 *Will.* 4. c. 114. which see in Appendix to these Reports, p lviii.

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Ex parte Bowden and another.

to proceed to trial without having complied with the provision of that clause, as relating to the *adjudication* at least, they might be nonsuited. There was no part of the 1 & 2 *Will.* 4. in which the *fiat,* the adjudication, and the appointment of assignees, were embraced in one view, in reference to them as matters to be brought in evidence; but these different documents of proceeding were each regarded separately. By the 13th section of 1 & 2 *Will.* 4. it was directed that the *fiat* should be "*filed and entered of record*" in the Bankruptcy Court, and that it should "*thenceforth be a record of the said Court.*" *Fiats* having originated with this act, and being by the same made *records* of the Court, it might be considered that the inrolment clause of 6 *Geo.* 4. could not extend to them. Again, the evidence of appointment of assignees was expressly provided for in the 29th section, by which it was enacted, that a certificate of the appointment of such assignees, purporting to be under the seal of the Court, should be received as evidence of such appointment, in all Courts and places whatsoever, without further proof. But the adjudication, though noticed in the 16th section, as a matter that might be in dispute, was so noticed only in contemplation of a particular case, namely, that of an issue directed by the Court of Review to try a question of fact; and it could hardly be supposed that the terms of this section amounted to a repeal of the 96th section of the former bankrupt act. It might have been the intention of the legislature, in passing the 1st & 2d *Will.* 4. that the necessity for inrolling the adjudication under the 6th *Geo.* 4. should be considered as wholly dispensed with; but there was nothing in the terms of the former of these two acts to

1832.

Ex parte BOWDEN and another.

warrant a conclusion to that effect. Then, with reference to the mere circumstance of these records being sufficient evidence of themselves *as such*, by the 16th section of the 1 & 2 *Will.* 4., all the proceedings under a fiat were to remain subject to the same requisites as those under a commission would have been, "save and except as might be otherwise directed by this act" (1 & 2 *Will.* 4); therefore, unless it could be shown that the inrolment clause of 6 *Geo.* 4., as relating to the adjudication, were positively repealed by the 1 & 2 *Will.* 4., the provision of that clause must be looked upon as so far adopted in the latter act, as that the adjudication would still require to be inrolled: and, secondly, that there was not necessarily any legal incompatibility between the effect of the 16th section of 6 *Geo.* 4., and the common law as operating under the 1 & 2 *Will.* 4., because there were instances in which matters, though of record in Courts of law, were nevertheless, required to be registered at particular places, for purposes specified in those acts of parliament, which require them so to be; as in the case of judgments as against purchasers and mortgagees of lands in Middlesex and Yorkshire, which, although records, would be nugatory as evidence of conveyances, unless first inrolled according to act of parliament (*a*).

Sir J. CROSS.—I cannot see how it should be necessary to inrol the adjudication. It is a record of the Court: all records of Courts of Record are evidence *per se*. The only reason for the inrolment required by

(*a*) 5 *Ann.* c. 18. s. 4.; 6 *Ann.* c. 35. s. 19.; 7 *Ann.* c. 20. s. 18.; 8 *Geo.* 2. c. 6. s. 1. 18.

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the 6th *Geo.* 4. is, that under that act, and previously to the passing of the 1st & 2d *Will.* 4., there was no place for the registering of bankruptcy proceedings, except the office appointed. But by the 1st & 2d *Will.* 4. those proceedings had all become records of this Court.

Erskine, C. J., expressed his doubts of the propriety of this Court allowing its records to be removed from their proper place of deposit.

Mr. *Cobbett* submitted, that the Court might do so, if it considered such an act expedient. The main question before the Court was, not so much whether the law now existing required the adjudication to be inrolled, as whether the Court might not consider the circumstances of the case sufficient to warrant them in granting this application for the purpose of avoiding an objection at nisi prius. Though this Court should decide that the adjudication no longer required inrolment, a contrary interpretation of the law might take place in the other Court on the trial, and if it should there be held that this part of the proceedings in a bankruptcy could not be evidence without inrolment, it would be a very hard case for the assignees, as they would have to suffer a nonsuit merely from the want of the permission of this Court to do that which the law imposed on them. This Court must surely have power to grant the application. The records of this Court, like those of other Courts, were required to be kept in safe custody; but it was contrary to the spirit of the common law, to that of the act of parliament which declared the subject's

right of access to records (*a*), and to the opinions of commentators of authority on that act (*b*), that any party interested in records as matters of evidence should be denied the use of them as the legal furtherance of his cause would render indispensable.

Cur. adv. vult.

Their HONORS subsequently, (out of Court,) made the order allowing the assignees to have the loan of the adjudication for the purpose of inrolment (*c*).

(*a*) Lord *Coke*, in preface to 3d Report, says:—

"Atque istæ quidem judicum sententiæ quia plurimum continent thesauri quasi reconditi, tuto ac fideliter, in archivo regio (idque merito sua maximo) asservantur: ita tamen interea ut cuivis subdito liceat in usum et commodum suum illas adire et consulæ, id quod antiqua lege Angliæ cautum fuit, postea declaratum et sancitum in magnis comitiis Anno 46 *Ed.* 3. habitis, in hæc verba," &c.

"The records of the king's Courts, for that they contain great and hidden treasure, are faithfully and well kept, as they well deserve, in the king's treasury; and yet not so kept but that any subject may, for his necessary use and benefit, have access thereunto, which was the ancient law of England, and so is declared by an act of parliament, 46 *Ed.* 3. in these words," &c.

(*b*) "It (stat. *Ed.* 3) plainly relates to such records in which the subject may be interested, as *matters of evidence upon questions of private right*. And it enacteth, 'That all persons shall, for the future, have free access to them, and may have *exemplifications* of them whether they make for or against the king.'" Foster's Crown Law, 1st Discourse, p. 229.

(*c*) See the Registrar's Book.

1832.

May 11.

Fiat amended, no proceedings having taken place under it.

In the matter of WILLIAM DOWELL GRAHAM.

MR. *SWANSTON* moved that the fiat which had been awarded in this bankruptcy, and described the bankrupt as *William Graham*, might be taken off the file and amended, by the introduction of the name of "*Dowell*," so that it would stand "*William Dowell Graham*." It appeared that no proceedings had been taken under the fiat. The Court therefore made the order.

In the matter of EASTCOURT.

May 12.

Service of petition to supersede by consent.

IT was held that a petition to supersede a commission, accompanied with all the requisite certificates and signatures of the creditors and the Commissioner, need not be served on the assignees, but the Registrar was directed, previous to drawing up the order, to see that all such requisites were properly complied with.

END OF EASTER TERM.

CASES

IN

TRINITY TERM, 1832,

IN THE

SECOND YEAR OF THE REIGN OF WILLIAM IV.

Ex parte REYNOLDS.—In the matter of REYNOLDS.

May 26.

It is no objection to the granting the certificate that the *date* of the signatures was attached by third person, if it be so done before the creditor signs his name.

General Orders may be dispensed with under circumstances in discretion of Court.

Cross, J. was absent.

THIS was a motion for the allowance of the bankrupt's certificate. It had been signed by the requisite number of creditors and the Commissioner, but was stopped in the office under the following circumstances:—

It appeared that the date attached to the signatures of the several creditors who had signed the certificate, had been written, not by the creditors themselves, pursuant to the General Order (*a*), but by the clerk of the solicitor to the commission, previous however to the creditors writing their names. The clerk also made an affidavit that he attached such date in entire ignorance of the existence of the General Order.

Mr. *Swanston* relied on the case of *Ex parte Laign* (*b*).

(*a*) General Order 8th August 1809. (*b*) 1 G. & J. 348.

1832.

Ex parte REYNOLDS and another.

The COURT thought that there was no sufficient reason for withholding the certificate, and therefore directed that it should be granted, observing that the General Order seemed only directory, and not conditional. The certificate was perfectly good in substance, the date having been attached prior to the signature by the creditors, and by their signature being virtually acknowledged by them. General Orders are not to be enforced so strictly as a statutory direction would be, but ought to be exercised strictly or not, according to the discretion of the Court.

Ex parte LOWLEY.—In the matter of LOWLEY and SAWYER.

May 26.

Affidavit of petitioning creditor may be read in opposition to petition to supersede.

THIS was a petition to supersede a commission of bankruptcy, on the ground of there having been no act of bankruptcy.

In the course of the hearing Mr. *Twiss* proceeded to read the affidavit of the petitioning creditor.

Mr. *Montagu* contended, that the Court ought not to allow the affidavit of the petitioning creditor to be read for the purpose of establishing the act of bankruptcy or trading, he being most evidently an interested party.

The COURT however thought that all affidavits were admissible (*a*), but would not have more weight on the minds of the Court than circumstances entitled them to.

(*a*) The Court came to a similar determination in *Ex parte Waring, in re Waring*, 7 June 1832.

Ex parte EMBDEN.—In the matter of EMBDEN.

1832.

May 26.

Where petition to supersede was presented to the L.C. before 11th January 1832, in order to save expense of new petition, service of motion on assignees that prayer of petition may be granted by C.R. sufficient.

MR. *KOE* applied for leave to amend the title of a petition addressed to the Lord Chancellor, under the following circumstances. The petition to supersede the commission had been presented to the Lord Chancellor before the new Court Act came into operation, and prior to the signature of all the creditors having been obtained. All the creditors had now signed and consented to the supersedeas, and the Commissioner had also signed.

Sir G. ROSE.—The proper course will be, in order to avoid the expense of amending this petition or filing a fresh one, to serve the assignees with a notice of motion that the prayer of this petition may be granted by this Court (*a*).

(*a*) See *in re Eastcourt, ante,* 457.

Ex parte JOHN RAPP.—In the matter of RICHARD SMITH.

May 30.

Where there is only one assignee surviving, and he, from his advanced age (72), is desirous of being removed from the office, the proper course is to procure a new choice in the room of those who are dead, and then to apply that he may be removed.

THIS petition stated that the commission against the bankrupt issued 1st July 1811, under which the petitioner, in conjunction with *James Bowden* and *Benjamin Howard*, who are both deceased, were chosen assignees. That since their death, the petitioner has conducted the business of the bankrupt's estate. Three dividends had been made, which exhausted all the funds received by the assignees, and there were no monies belonging to the estate, except *24l.* 14*s.* 9*d.*

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Ex parte Rapp.

which was in the hands of the bankers to the commission. But a question might arise, whether certain monies had not become due to the estate under the will of *James Smith*, by which the residuary estate of the testator was bequeathed to the bankrupt and others, but which monies or funds have not yet been received or got in, and which are involved in some questions of legal difficulty. The petitioner was 72 years of age, and being very infirm and in an ill state of health, was incapable of attending to his duties as an assignee of the said bankrupt's estate.

The prayer therefore was, that the petitioner might be discharged from being such assignee, and that a meeting might be appointed for a new choice, and the costs thereof and of the application might be paid out of the fund in hand of the bankers, or any future effects of the bankrupt coming in.

Mr. *Hughes* appeared in support of this petition, and asked for the costs, it being for the benefit of the estate, owing to the petitioner's great age, that he should be removed, and relied on an Anonymous case in 5 Maddocks (*a*).

Sir G. Rose.—How can you apply to remove the assignee, when there is no person on whom the estate would devolve on such removal? The proper course is, first to have the appointment of one or more assignees, in the place of those who are dead; after which the petitioner may apply for his discharge.

The rest of their Honors concurred in this opinion.

The petition was therefore dismissed.

(*a*) p. 76.

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Ex parte ELLIS, and others.—In the matter of Sir G. DUCKETT, and others.

May 30.
June 6.

On one petition by the assignees, ordered that the respective agents of several societies be allowed to tender proof of their respective debts before Commissioner, but not to have any power over certificate or in choice of assignees.

MR. *MONTAGU* applied on a petition presented by the assignees of the above bankrupts, that the respective treasurers and agents of several corporations, societies and institutions, namely:—County Fire Office, Provident Institution, County Annuity Institution, Metropolitan Bread Company, Literary Union, West London Association, Association for Encouragement of Literature, British Institution, British and Foreign Union Club, King's College, Nova Scotia, Naval and Military Library and Museum, Laboratory Fund of the Royal Institution, Sinking Fund, Society for Bettering the Condition of the Poor, Ladies' Committee, New Society of Painters in Water Colours, Philanthropic Society, Royal Institution, and several others; part of whose funds had been deposited in the bankrupt's hands as bankers, might be at liberty to go before the Commissioner and tender proof of their respective debts. He suggested that it was in order to save the immense and unnecessary expense that would be caused to the estate by presenting separate petitions on behalf of all the above institutions, that the assignees had adopted the present course themselves, under the sanction of by far the greater majority of creditors who had proved under this commission. A similar proceeding had been approved of by Lord *Eldon*, in *Ex parte Seymour, in re Marsh* (*a*), though it was not on the application of the assignees. But he really felt that it was for the benefit of all parties that the assignees should be allowed themselves to present this petition.

(*a*) 11th February 1825.

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June 6.

The COURT, after some considerable hesitation and doubt whether it was consistent with the character of assignees that they should be thus active in facilitating claims against the estate, and requiring the production of the brief in *Ex parte Seymour*, on its production by Mr. *Montagu* this day, made a similar order to the one made in that case, namely, that the agents should be permitted to prove, for the purpose only of receiving dividends and not so as to give them a right to interfere in the certificate or choice of assignees.

Ex parte JOSEPH TRUEMAN.—In the matter of RICHARD MARTINDALE.

In 1811 *A.* and *B.* entered into a partnership, which continued till 1811, when it was dissolved, and the affairs wound up, except as to some outstanding debts. In 1820 a deed of release was executed, from which these debts were excluded. Partnership books relating generally to these and other debts were all along suffered to remain in *A.*'s hands. All the outstanding debts were subsequently settled. In 1830, *B.* was declared bankrupt, till which time the books were never called for by *B.*:—Held, that *A.* and *B.* nevertheless continued tenants in common in respect of them, and that the length of time did not affect that relationship; and, therefore, although there was no charge of fraud in the settled account, yet the Commissioner had jurisdiction to call *A.* before him, and examine him and the books relative to the former dealings of the bankrupt.

THIS was a petition presented (by consent (*a*)) to try the right of the Commissioner to examine the petitioner as to the dealings of the bankrupt during the time he and the petitioner were in partnership together, commencing as far back as the year 1811, but which had virtually been dissolved since the year 1818; or to inspect certain books of account formerly belonging to the partnership, but at present in the hands of the petitioner.

The following is the more particular detail of the circumstances of the case:—In the year 1811, the petitioner entered into partnership with the bankrupt, and

(*a*) By arrangement with Mr. Commissioner *Fonblanque*, this mode of trying the right (without regard to the question of the Court's jurisdiction) was adopted in order to avoid the commitment of Mr. *Trueman*, which would otherwise have been necessary to have enabled him to petition for an exercise of control over the judgment and discretion of the Commissioner. See *Ex parte Beeston*, 1 Mont. & M. 244.

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by their articles of partnership it was stipulated, that the account books (which were the subject of the present petition) should remain the joint property of the partnership at its dissolution. In December 1818 the partnership was dissolved by mutual agreement, and the accounts were gradually wound up till July 1820. On the 8th June 1820 an indenture was executed, which recited that a general account was, on the 13th April 1820, made up and signed between the bankrupt and the petitioner of all debts due to and from the firm, except as regarded an action at law then pending in the King's Bench against them; upon which statement a balance of 1927*l.* appeared to be due to them over and above bad and doubtful debts; and that all the partnership effects were divided: and, by the indenture, mutual releases were given, except only as to the bad and doubtful debts, and the action which was still pending. By a memorandum indorsed on the indenture they agreed not to divide the 1927*l.*, but that it should remain for further settlement, and as a fund to answer any claim that might arise against them. The action was decided against them, and the demand against them arising out of it was satisfied out of the 1927*l.*; upon which the sums that remained were settled and divided. At that time the books of account were, "*with the knowledge and assent, and by the consent of the bankrupt, left in the hands, custody and power of the petitioner,*" and remained so till the present time; and all dealings since the last settlement entirely ceased between the bankrupt and petitioner. After the accounts had been "fairly and honourably" settled and closed, namely, in May 1830, *Martindale* was declared a bankrupt. His assignees claimed an

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uncontrouled right to inspect the books of account; although offers were made by the petitioner to give the assignees every facility, by inspection or otherwise, into the matters excepted out of the release of June 1820, the assignees insisting on the right to inspect the whole of the partnership books from the year 1811 down to the final settlement of accounts. In April last the petitioner was summoned to appear before Mr. Commissioner *Fonblanque* and be examined, and to produce the books in question. The petitioner declined to produce them. The petition prayed that it might be declared that the assignees were not entitled to inspect the said books, (save as to those matters excepted out of the deed of release of June 1820,) and that the Commissioner might be restrained from examining the petitioner as to the accounts released, and from requiring the petitioner to produce the books in question.

Mr. *Swanston* and Mr. *Wood* for the petitioner. The partnership having entirely ceased, and all the accounts being fairly settled, the bankrupt has no interest whatever in the books in question. Without an interest he can have no right to any discovery or relief upon a bill in equity, or in an action at law. In both cases a demurrer would lie to the right claimed. The only interest he could have would be with a view to opening the account, which could only be obtained by a suggestion of fraud or error,—a charge not made on the present occasion: *Kinsman* v. *Barker* (*a*), *Beckford* v. *Wildman* (*b*), *Chambers* v. *Goldwin* (*c*). So far from there being any suggestion of fraud in the accounts,

(*a*) 14 Ves. 579. (*b*) 16 Ves. 438. (*c*) 9 Ves. 264, 265.

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there is not even any single reason suggested why the inspection is required; the general right alone is insisted on by the assignees, amounting in fact to mere idle curiosity. The assignees have no more right than in the case of a mortgage; there, on the bankruptcy of the mortgagor, the assignees have no right to call on the mortgagee for production of the title-deeds—the mortgage-deeds being all they can acquire (*a*). The petitioner has at present the right to the books by possession, and after the lapse of ten years the bankrupt ought to be considered as barred of his right, if he had any, after the deed of release of June 1820.

June 1.

Mr. *Wright* and Mr. *Stephens* for the assignees of *Martindale*. By the original deed of copartnership, and by the common law right existing between partners, they became tenants in common of all the property of the partnership. The title to the books in question has never been released by the bankrupt, and he cannot be devested of his right by casual possession in the co-tenant in common after any length of time. The nature of tenancy in common is such, that the possession of one is the possession of both, and the right remains as long as the estate exists. We therefore rest our case on that right, and by the act of parliament the assignees are virtually entitled to examine them, through the medium of the Commissioner (*b*), as standing *in loco* of the bankrupt, without assigning any specific reasons for so doing. The case of *Ex parte Levett* (*c*) is precisely similar in principle to the present, and in our favour. There a partner was ordered to attend before

(*a*) *Ex parte Caldecott*, 1 Mont. 55; *Ex parte Frowd*, 1 Mont. & M. 269.
(*b*) 6 *Geo.* 4. c. 16. s. 33. 34. (*c*) 1 G. & J. 185.

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the Commissioners to be examined and produce the partnership books, although there was no suggestion of his being indebted to the bankrupt, or having the property of the bankrupt in his possession. If the objection that we can obtain no advantage from the inspection can hold good, then every witness may demur to being examined, on a similar ground; for our object is to inspect them, for the purpose of seeing what advantage we may gain. But, independent of the general right, we have a right, in order to see whether there has been any fraud in the accounts, so as to enable us, on a bill in equity for that purpose, to open the accounts.

Mr. *Swanston* in reply. The general danger that would result to all mercantile transactions from a contrary rule, warrants that a stated account shall be binding, till a strong case of gross fraud is made out for opening it. In a bill for that purpose a very special case must be made out, and supported by proof. See the cases of *The Earl of Liverpool* v. *The Princess of Wales* (*a*), and *Tyler* v. *Drayton* (*b*). Here we have the possession, which forms the basis of the right of property, according to *Bracton* (*c*). In *Ex parte Levett* the partnership still existed, and there had been no account settled between the parties: this circumstance forms the distinguishing feature from the present case. By the act it is not a general power of examining that is given, but only such questions as are "lawful," that may be put (*d*). There is no power, for instance, given to examine the wife of the bankrupt as to acts of

(*a*) 1 Swan. 115.
(*b*) 2 S. & S. 309.
(*c*) Lib. ii. cap. xxii. p. 51, 52.
(*d*) 6 *Geo.* 4, c. 16. s. 34.

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bankruptcy. In this case there is no suggestion of error or fraud in the account settled, which are the only grounds upon which the Court would unravel an account of so long a standing. In the absence of error or fraud proved, or at least suggested, questions touching the account would not be lawful; for the settled account cannot be inspected, and there is only, therefore, a right in the assignees to examine as to those matters excepted out of the release.

ERSKINE, C. J.—This petition calls upon the Court to restrain the Commissioners from examining the petitioner as to the accounts and matters released by the deed of the 8th of June 1820, and from requiring the petitioner to produce certain books mentioned in the prayer of the petition; and I confess at first I was startled at the proposition that this Court should interfere before-hand to restrain and limit the power which was vested in the Commissioner by the act of parliament. I thought that the true position which this Court should occupy was the superintending the exercise of that discretion, after it had been exercised according to the power given by the act of parliament, and that it should not interfere prior thereto. The parties, however, thought it would be the most convenient mode of acquiring the opinion of this Court to have it discussed under this petition, being contented with an intimation of the opinion of the Court upon the subject; and upon that understanding the discussion has gone on. Now looking to the nature and subject of these books, it is quite impossible not to say that they come within the scope and limits of the 33d section of the act of parliament(*a*); they are books rela-

(*a*) 6 *Geo.* 4. c. 16. s. 33.

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ting to the dealings of the bankrupt, and may or may not be necessary to the full disclosure of them. Then it is said that these books should not be produced, because, although they do relate to the dealings of the bankrupt, yet that these dealings have been long since closed by the settlement of the accounts and by mutual releases executed between the parties. If the property of these books had been shown to be in the petitioner *alone*, then I should have said it would not be right to permit the bankrupt's assignees to enter into any discussion as to the contents of those accounts, without first laying a foundation, by showing some fraud in the settlement of the accounts, which was the foundation of the release; because it is quite clear that if they had made out a case of fraud in that respect, a Court of equity would have interfered so far as to have granted a new account between the parties notwithstanding the release; and so the Commissioners of this Court would have been justified in interfering, notwithstanding such settlement and subsequent release. There is no case of fraud suggested on the part of the respondents. It is not put upon that ground; but the ground upon which the respondents put it is, that these books were originally the property of the two partners; that at the dissolution of the partnership these books were left undisposed of between them; that they remain the property of the two partners; that each has an equal interest in them; and that each has an equal right to the inspection of them; and inasmuch as this right continued in the bankrupt up to the time of his bankruptcy, that the assignees have the same right now; and that there is a greater reason why the assignees should have the power of inspection than even the

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bankrupt himself, because they are ignorant of the contents of these books. They may require the inspection of these books, not merely as against Mr. *Trueman* for the purpose of opening the accounts, but for the purpose of seeing whether the accounts which the bankrupt has given of his own transactions be fair or not, and for the purpose of having a full discovery of the dealings of the bankrupt. And I confess I cannot see how the property in these books was ever devested out of the bankrupt, and how the exclusive right of property in them was ever vested in Mr. *Trueman*.

By the original articles of partnership, at the period when the partnership was to close, the agreement was, that certain of the outstanding debts should be passed over to one of the partners, and others of them to the other partner, and that the books relating respectively to such debts should be transferred to the respective partners. That agreement appears, at the dissolution of the partnership in 1818, not to have been abided by; for they then come to a determination to settle the accounts together and to divide the receipts, with the exception of certain outstanding doubtful debts. In the year 1818 the partnership was dissolved, and it has been said, that by that dissolution these books ceased to be the property of the two partners, and that they became the property of Mr. *Trueman*, because they were in the custody of Mr. *Trueman*. But the dissolution, *per se*, of a partnership could have no such effect; it only has the effect of preventing either partners from involving the other in fresh liabilities; but all liabilities previously incurred still subsist as against the partnership, and all rights which either of the partners had before the dissolution of the partnership still subsist:

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and all the property which was joint property, till it be divided, still remains the property of both, though not perhaps in the same way as it did. But still there is not a transfer of the property to the one partner exclusively of the other, because it happens to be in his warehouse or in his counting-house. In the year 1820, after they had gathered in some of the outstanding debts, a release was executed; and it is said at that time, that inasmuch as the books were left in the custody and power of Mr. *Trueman*, that they hereby became his property. Now in the release there is nothing which indicates any intention on the part of these partners to give to either the one or the other of them the exclusive right to these books; on the contrary, it should seem as if there were not any intention of that kind, because there were certain outstanding doubtful debts which were not then divided, and which are excepted out of the release. If it could be said that the right of property in these books was vested absolutely in Mr. *Trueman*, to the exclusion of Mr. *Martindale*, at that time, then he would have had no power of inspecting these books at any time afterwards, but by the permission of Mr. *Trueman*, with reference to those outstanding doubtful debts. But it is said that they remained in the custody of Mr. *Trueman*, and that "with the knowledge, assent, and by the consent of the said bankrupt they were left in the hands, custody, and power of the plaintiff." Now can it from this be argued, that therefore the right of property was transferred, although at that time there were still outstanding these doubtful debts, in which Mr. *Martindale* was equally interested with Mr. *Trueman?* On the contrary, the bankrupt, by his affidavit, states that the

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books having been in the custody of Mr. *Trueman* during the partnership, in the counting-house belonging to Mr. *Trueman*, that after the dissolution, from the year 1818 to the year 1820, he having always had the inspection of them, supposed he should continue to have it equally afterwards; and therefore he assented to their remaining in the counting-house, which was in a very convenient situation for his inspecting the books; but "he denies that he ever consented to the books of accounts, save as aforesaid, being left in the hands, custody, and power of *Trueman*, or that he ever assigned or relinquished his interest or property in the said books." Now there is no assertion on the part of the petitioner on the one hand, that he ever did relinquish his right; and there is a direct denial on the part of the bankrupt of his having done so. The only ground on which he claims the property in the books is the fact of their having remained in his custody with the assent of the bankrupt from that time, namely, the year 1820 down to this period.

Now it is said that since that time he has never examined them—that may be—but that does not create an adverse right. If they had not been in the situation of tenants in common of this property, its remaining in the possession of an individual for a length of time might be considered as an adverse possession, so as to deprive the other party of any remedy, whatever the property might be. But here the proposition of law is, that no length of possession by a tenant in common is sufficient to deprive the co-tenant of those remedies which another party, a stranger, would have been prevented from exercising.

Then this continues down to the present period, and

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the assignees now say, "we wish to look at these books to see what the rights of the bankrupt are, and to see what our rights are as against the bankrupt, and to have a full investigation of his affairs, and we ask to have that under the act of parliament." Now it by no means follows that because they have a right to inspect these books, and to examine Mr. *Trueman* on the subject of these accounts, that therefore they have a right at any time to open the accounts as against Mr. *Trueman*. That is a totally distinct and separate proposition; and no proposition can be more clear in law than that they have no right whatever to open these accounts, unless they can show fraud in the concoction of them. Therefore it is quite clear that they must make out a case of fraud before they can call this Court or any other Court into a discussion of these accounts as between Mr. *Martindale* and Mr. *Trueman*. But that does not deprive them of their right of inspection either as between themselves and Mr. *Trueman* or any other party. Therefore I am of opinion that the assignees have the right of inspection which they claim, and that this petition should be dismissed.

I should certainly not be inclined to make any order upon the subject of the inspection, but I should wish to leave it in the hands of the Commissioner, that he should exercise his judgment on the matter, and should exercise the power vested in him as he shall think fit; certainly I am of opinion the assignees have the right.

Sir A. PELL.—This is a case of peculiar difficulty, and one also that involves in the determination of its principles, as important a subject, with reference to the commercial world, as ever was decided in a court of

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justice. I shall most studiously guard against being supposed to give any direction or intimation to the Commissioner, as to what he is to do when Mr. *Trueman* and the books appear before him.

At the time of the execution of the indenture of release, there were still existing certain parts of the commercial transactions between the two partners, which were not finally closed. There was then a very considerable debt claimable against the estate by a foreign house, which clearly was left open and undecided, and which ultimately has been decided against the partnership concern; and with respect to that debt, and any other calls which might have been raised against the partnership concern, the sum of 1927*l.* was reserved as a fund, out of which any of the disputed claims at any future time might be satisfied. As long, therefore, as there were disputed claims, these books were essentially necessary to both the partners; because, although the partnership was dissolved, yet the partners had an interest, with reference to those disputed claims, and therefore these books became, or might become, of value for that purpose. They could not, therefore, with any show of justice or propriety have been destroyed. But it is stated in the petition, and it is not denied, that these outstanding debts, and all pecuniary engagements, with reference to the late firm of *Martindale* and *Trueman*, have long since been paid and divided between the parties.

Then how does the case stand in the year 1820? Deeds of release are executed, accounts are settled, and as far as they then extended, the business closed. In 1830, ten years after this period, Mr. *Martindale* became a bankrupt. In 1832 the Commissioner calls

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upon Mr. *Trueman* to appear before him, and to produce the ledgers, notwithstanding the release executed. It may be that there is this right. I am not now saying that there is not—but I say this distinctly, that it would require strong facts, and great force of argument too, to induce me to call upon any man to produce books in a closed account in the year 1820, those books reaching back as far as the year 1811. But it is said that Mr. *Martindale*, or his assignees, have a property in these books; that they are as much the books of Mr. *Martindale* or his assignees as they are the books of Mr. *Trueman*. Supposing at the date of the release these books were then considered as the joint property of *Martindale* and *Trueman*, and yet in 1821 Mr. *Trueman* had destroyed these books, and by so doing had given an opportunity to Mr. *Martindale* to try the right of property in an action of trover brought by him; and six years have elapsed from the time of the destruction, with knowledge on the part of Mr. *Martindale* that they were then so destroyed, and he had instituted no suit in order to recover damages for the loss and destruction of that property, in which he has a joint interest, it is very questionable if Mr. *Martindale* would not have been bound. The statute of the 6 *Geo.* 4. gives great authority to Commissioners, and I am not prepared to say that that authority and power is improperly lodged in their hands (*a*). The words of the clause are general. Undoubtedly under them, the Commissioner has a right to call before him Mr *Trueman*, with all the books and all the documents, if they are in existence, which are referred to in the summons; but it by no means follows, as a necessary consequence, that the Commissioner, in his discretion, would either

(*a*) See observations in the matter of *Goodwin*, 1 Mont. & B. 305.

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himself inspect them, or permit the assignees to do so. It is matter for his discretion, and for him to decide when they are laid before him. I will say nothing as to the exercise of that discretion; but after the lapse of twelve years, when witnesses are dead, vouchers destroyed, and accounts closed, I can conceive nothing so injurious to the commercial interests of this country, as having these accounts opened to the inspection, either of assignees or Commissioners. Before I should permit this, I should think that some strong circumstances ought to be laid before me, in order to induce me to do that which is of so perilous a nature. If there is fraud alleged, if there is injury insinuated, if there be any right which has been improperly and illegally taken away, I am not prepared to say that there may not be a case in which the thing ought to be done. But in a mere fishing account, without being aware that there is any one leaf in these books which will open the door to any substantial or useful inquiry, I think it would be but to strike at the best interest of commerce to permit this to be done. There is not the slightest reason to believe, that from the year 1820 down to the year 1831, when Mr. *Martindale* became a bankrupt, that Mr. *Martindale* ever thought it worth his while to look at any one of these accounts. For ten years he remains acquiescent in that settled account, and during all that time it never occurred to him, that his interests had been improperly affected by the account that had been settled. But it is said by the assignees, that when Mr. *Martindale* left this concern, he is supposed to have left it with a very considerable fortune derived out of it, and they wish to know, through the medium of these books, what he has done

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with that property. I put the following case, which, though I know that it is not altogether in point, yet is analagous in some way. Suppose a bankrupt, a year before a commission is taken out against him, had sold an estate for 1000*l.* to me, and I had the conveyance from him, in which that specific sum was set forth: he goes before the Commissioner and says, I have sold the estate for 3000*l.*, the Commissioner says, we have the best means of knowing for what you sold the estate, because we can call before us the purchaser, and direct him to produce the conveyance. I should like to know where is the power to compel me to produce the title deed of my conveyance. I am aware that it is not a case directly in point, because it is the case of a stranger, and one unquestionably stronger; yet this case may come very near it, because if these books after a long lapse of time had become the property of Mr. *Trueman*, in the one case, the assignees would have no right to require me to produce my title deeds in order to make out a right against the bankrupt; so in the other case, if the books were the property of Mr. *Trueman*, they could not compel him to produce them.

I think that Mr. *Trueman* is bound to attend before the Commissioner, and he is bound to produce these books before the Commissioner, and the Commissioner will exercise that part of his duty in such a way as shall seem right to him, and will deal with the parties when they come before him in such manner as he shall be advised with reference to this case. I therefore decline giving any opinion as to the propriety of the Commissioner calling upon Mr. *Trueman* to give that inspection of them.

Sir G. ROSE.—In this case it is a great advantage to

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the parties, that the counsel on both sides have adopted this course in allowing us to entertain this important question as to the course to be taken by the Commissioner of this Court. The *petitioner* could not for a moment, in an adverse mode of putting it, bring it forward as a case in which this Court could interfere; because under the former jurisdiction, and certainly under this, the Commissioners, in their examination of parties, and in every incident connected with it, are acting under as high a sanction as this Court, or even the Lord Chancellor himself. This Court, as the former Court always did, would disclaim any interference with the Commissioners in the discharge of those duties which they are to exercise (*a*).

Let us consider the case as it now comes on in its regular bearings. Now Mr. *Trueman* is brought before the Commissioner, and he is asked, "You were in partnership with the bankrupt?—Yes. You attend here under a summons, produce it. That summons contains a notice to you to produce certain books, do you produce them?—No. Your reason?—My reason is, that I was in partnership with the bankrupt, and in the year 1818 that partnership was dissolved, and all the accounts regularly stated and settled, and there was a release proceeding upon that statement and settlement of accounts and executed; and these particular books by express covenant were deposited with me. Upon this ground I have not thought it proper to produce them." Now that, as far as I have stated it, is the examination before the Commissioner, and it would be also a mode of presenting the whole case in order that it might be looked at correctly. It would carry these

(*a*) See *Ex parte Beeston*, 1 Mont. & M. 244.

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two farther instances. Mr. *Trueman*, do you mean to say that the production of these books would expose you to any penalty or forfeiture of estate? That being answered in the negative, the whole would be embodied on the warrant of commitment; and then the question would be raised afterwards before us, how far the Commissioner could properly exercise his authority upon Mr. *Trueman* or not? Now I conceive that this is the right way of putting it as to any circumstance which could affect the production of these books. Whatever may be the conjecture, and possibly the fair inference as to a circumstance which may operate as to the withholding or producing of these books, I think it is to be taken as argued before us upon this admission on the part of Mr. *Trueman*, that the production of these books could expose him to no penalty nor to the forfeiture of estate. And then the question would be, whether or not the commitment, which we should so consider the Commissioner as having made, and which would be brought before us in the ordinary mode of trying it, should stand or not? Now there again, with regard to the Commissioner, the Court would be placed in the same situation. It would be for the Court then to decide, and we should try the question upon the warrant. Then in this way we should try the question, not with reference to whether the Commissioner's discretion had been properly exercised or not, but whether in the state of circumstances, as embodied in the habeas corpus, Mr. *Trueman* would be entitled to be discharged or not. Most ingenious as is the argument which has been urged by the counsel for the petitioner, who have asserted this proposition, viz. that if relief cannot be granted in a Court of equity, or to the object for which the assignees are seeking

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to have the examination, could not be obtained in a Court of law, that therefore the Commissioner has no authority whatever to call for the production of that particular instrument or document on which the supposed relief is to be founded, that is a proposition which is by no means tenable, and cannot be sustained: and indeed it is controverted by the cases which the learned counsel have cited. Unquestionably I admit that the objects to be obtained in a Court of law or equity, or how far the interest of the estate can be looked into with respect to the probable result of the suit or action, or how far that alleged as a ground would be a defence in any Court in which those documents are to be produced, are circumstances, which properly ought to affect the discretion of the Commissioner. But it is too much to put it as an estoppel of his authority. It is far wide from his not having the right or authority if he thinks fit to exercise it. Let us try that by the case of *Ex parte Caldecott*, which has been cited (*a*). It cannot for a moment be disputed, that the relation of mortgagor and mortgagee being created by contract, although the *mortgage deed* is an incident to the relative rights of both parties, and open to both, yet it can only be got at in a Court of equity, where the mortgagor comes forward admitting the right of the mortgagee and tendering to him his principal, interest, and costs. Now that is the case in *Ex parte Caldecott*, but where was it ever for a moment doubted that, without tendering the principal, interest, and costs, without putting the party in the position in which a Court of equity would have obliged him to be put before the inspection, the Commissioner might have

(*a*) 1 Mont. & B. 55.

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the *mortgage deed* produced, or examine the mortgagee as to what was contained in the deed, whether upon tendering him any relief or not? That was the ground, even when the express object was to destroy that deed without giving the mortgagee one sixpence of the money. But in *Ex parte Caldecott* it went further; it tried the incident both with reference to law and equity. In that case, the mortgage deed was in the possession of the solicitor, and the objection was set up with regard to the lien of the solicitor, and we perfectly well know, that a lien, however trifling it is, would be an answer to any action of trover that might be brought; for a party would only have to say this to the party wishing to inspect the deeds, "you may have an interest to the whole extent of this property, but I have a lien, and therefore you shall not inspect the deeds;" yet there the solicitor was not allowed to set up any lien against the right which the assignees claimed by the authority of the Commissioners. They were entitled to have the deed produced in the first instance, without tendering him the amount of the lien or the mortgage money. As to the *title deeds*, it is too much to infer, that there could be any opinion of the Court expressed as to how far the *title deeds* must be produced before the Commissioner; in that case, all that the assignees wanted was the *mortgage deeds*, and it was unnecessary to say any thing on the subject of the *title deeds*. The question is still one which may be carried to a decision as to whether even the *title deeds* may not be produced, and then it would be a matter of discretion how far the Commissioner would act upon them, he taking the *title deeds* themselves. There is nothing in that case to warrant a contrary inference.

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Now the proposition which I take the liberty of stating as to the authority of the Commissioner, is this, that it cannot be affected by the right which is derived in a Court of equity or a Court of law. It is possible to imagine many modes in which the assignees could get at the books in the direct relation in which the parties stand upon the record; for although the stated account goes down to the year 1818 it does not go down to the circumstance of the partnership subsisting in equity from 1818, down to this very moment; the plea of stated account could only go to the year 1818; and although the dissolution of the partnership is by deed, and although possibly by law there may be a dissolution of partnership, yet as long as there were outstanding debts uncollected and unsettled, they were the property of the partnership, and they would stand in the same relation of partners in which they once stood; the plea of stated accounts would only go down to the year 1818, and on the allegation of these outstanding debts in 1818 having been collected to a considerable amount, a Court of equity would compel a discovery, whether or not they had been received; and Mr. *Trueman* would be bound to admit that these books were in his possession, and upon that admission he would be bound to give an inspection of them in all respects the same as if the partnership were then existing.

Now let us take another mode of putting it. Supposing the assignees were to say there were certain debts outstanding which we are anxious to recover for the bankrupt's estate, but which Mr. *Trueman*, the solvent partner, will not join us in doing. Could not a bill be filed in which Mr. *Trueman* could be called upon, under an indemnity from the assignees, to lend

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his name to recover these outstanding debts, which the assignees could not recover without him; and, as incident to such bill, must not the question be answered whether these books were in the possession of Mr. *Trueman* or not?—and, if they get the admission, will not the Court act on the admission, and give the inspection? It is unquestionably so in this mode of looking at it. Now try it again. Could not the messenger, under the old act of parliament, have gone in and taken possession of these books? Could he have not gone into the very house and seized these books in respect of the interest which the assignees had in them. Let it be remembered that the power in the messenger is continued by the present act: and again, whether it be a tenancy in common, or a joint tenancy, or otherwise, the messenger clearly would have had a right to take them under the old act of parliament; for a power is expressly given to him under the act of the 6th *Geo.* 4. (*a*) to do so. And if Mr. *Trueman* came into this Court in order to prevent the messenger from so doing, this Court would give him no protection, but upon his tendering to the assignees a reasonable inspection at all times under an arrangement to be made between them.

Now as to the right which Mr. *Trueman* has acquired by the possession of the books. It is not the mere delivery of the chattel without more, which passed the property in the books. But here are those books containing the incidents of the joint property in which they are interested expressly protected, not by any thing going to the delivery of the books, but by an

(*a*) S. c. 29.

undertaking and by express contract for the custody. The very terms of providing for the custody of the books is an express contract, which excludes any argument which could be raised as to the kind of property which passed by the delivery of chattel, and by the mode of putting which you state that the books are merely deposited. 1832. Ex parte TRUEMAN.

Another mode of putting it may be this: it is impossible to say that the assignees may not have an interest in looking at these books. I have not heard one suggestion on the part of the petitioner that he will be injured by these books being produced; and it is quite possible that the creditors may be benefited by it. It is possible that there may be a state of circumstances which will point at once to an anxiety to get at the accounts; for nothing but that would induce the assignees to take the trouble of getting at them, and there ought not to be any difficulty in doing so. We are bound to protect the creditors; and the incidents of the rights that the creditors have, under a commission of bankrupty, is a powerful and a preponderating circumstance upon the question of convenience or inconvenience. Upon the whole I think the petition must be dismissed, and with costs.

Note.—The Commissioners subsequently decided that he had the power to inspect the books in question. From this decision it was intended by the parties to have appealed, but the matter was afterwards compromised.

MEMORANDUM.

On this day Mr. Serjeant *Merewether* took his place within the bar as Her Majesty's Counsel learned in the law. *June* 2.

1832.

Ex parte NEAL.—In the matter of BARTLETT.

A. employs *B.* a solicitor, to strike a docket against *C.* which is done, but afterwards is abandoned. Subsequently *A.* employs *D.* to strike a docket which is regularly followed up:—Held, that *A.* is not entitled to have *B.*'s costs taxed under the commission.

THIS was a petition to tax a solicitor's bill under these circumstances:—Mr. *Vines* had been employed by the petitioner to strike a docket against the bankrupt, he having assured the petitioner that he should be able to establish and support an act of bankruptcy. Failing however to do so, the docket was abandoned. The bankrupt having subsequently filed a declaration of insolvency, the petitioner employed another solicitor to strike a fresh docket, upon which a commission issued. Mr. *Vines*, after delivery of his bill for striking the abandoned docket, was now proceeding to recover its amount against the petitioner. The petition stated that the bill contained extravagant charges, and, by praying for its taxation, sought to restrain the proceedings against him for the amount.

Mr. *Bacon* for the petitioner.

The COURT, however, were of opinion, that they had no jurisdiction to make any order upon this petition, as the bill of costs had been incurred, not in this bankruptcy, but in striking a docket which had been altogether abandoned, and therefore

The petition was dismissed.

1832.

June 5.
Committee Room, No. 16.
Rose, J. was absent.

Bankrupt residing so far off that before his signature to a petition to enlarge the time (to which he assented) could be obtained, the time for opening the fiat would expire, his solicitor was allowed to sign the petition on his behalf.

Ex parte CRADDOCK.—In the matter of NORTH.

THE facts and prayer of this petition were similar to those in the case of *Ex parte Dowten in re Wisden*, in a former part of this volume, viz. for the enlargement of the time for opening the fiat (*a*). The Court expressed a similar opinion; and that without service of the petition on the bankrupt, the Court could not entertain the question for a moment.

Mr. *Montagu* suggested that the bankrupt was willing to have the petition granted, but residing a long distance off in the country, the time for opening the commission would expire before his signature to a petition to facilitate this object could be obtained. He therefore asked that the solicitor to the commission might be allowed to sign the petition on behalf of the bankrupt.

The COURT granted the application, stating they did so on the responsibility of the solicitors, over whom, as officers of the Court, they had a very sufficient hold for their right conduct.

(*a*) *Ante*, p. 111.

Ex parte GREEN.—In the matter of RIDLEY.

Same day.

On application tending to enforce a party to take the office of assignee upon him against his wish, he must be served with notice of it.

THE COURT in this case held, that an application tending to compel a party to take upon himself the trust of the office of assignee, against his wish, could

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Ex parte GREEN.

not be heard without his being previously served with the petition.

Mr. *Montagu* and Mr. *Bayley* for the petitioner.

Mr. *Kindersley* and Mr. *Bichner* for the respondents.

Ex parte STEEL.—In the matter of STEEL.

June 5.

On application to remove one of several assignees, the proper course is to petition for a new choice.

PER CURIAM.—In order to remove one assignee from the trust, he refusing and having never accepted it, the proper course is to petition for an entire new choice; for *non constat*, that the choice might have devolved on those remaining, if the creditors, at the time, had been aware of the rejection of the office by the party sought to be removed (*a*).

Mr. *Montagu* for the petitioner.

(*a*) The same was determined in *In re Williams*, on the 16th June, 1832. Mr. *Lovat* for the petitioner.

Ex parte FRY.—In the matter of STINCHCOMBE.

June 14.

Petition part heard and adjourned: fresh affidavits cannot be filed.

THIS petition had been ordered to stand over on the 5th of June last, in order that certain witnesses might be examined *vivâ voce*. The witnesses having been examined accordingly, on this day Mr. *Montagu*, in commenting on that evidence, tendered an affidavit to the Court, which had been sworn since the 5th of June,

the day of adjournment, contradicting the evidence adduced on the examination.

1832.

Ex parte Fry.

Mr. *N. Ellison* contended, that it was irregular, and objected to the affidavit being read.

The Court thought the objection good, and accordingly rejected the affidavit, observing, that the petition ought to be now heard as it originally stood on the 5th of June, the party, without a proper application to the Court for that express purpose, having no right to file further affidavits.

Ex parte Williams.—In the matter of Hall.

June 16.

Mortgagee applying for leave to bid must always pay costs of petition, unless consent otherwise.

This was a petition of an equitable mortgagee for a sale of the mortgaged premises, and for liberty to bid.

Mr. *G. Turner* applied that the costs of the application might come out of the produce of the sale.

The Court said it must be considered as a general rule, that in all these cases the equitable mortgagee must pay the costs of an application for liberty to bid out of his own pocket, unless the assignees should consent otherwise (*a*).

(*a*) The case of *Ex parte Brown*, ante, p. 34, is stated in terms too broad. Sir *G. Rose* in that case intended, that Mr. *Reynolds* being instructed to consent, was instructed to consent generally to the whole prayer of the petition, and therefore to that part which asked costs of the petition out of the estate. It was on that implied consent that the order was made. See also *Ex parte Robinson*, 1 Mont. & M. 261.

1832.

June 16.

Affidavit filed before petition filed, bad, unless notice given of reading them, which notice must be verified.

Ex parte PALMER.—In the matter of PALMER.

PER CURIAM.—Affidavits filed before the filing of the petition cannot be read in support of it, unless notice be given to the respondent of the intention of doing so. And such notice will stand for nothing, and cannot be read at the hearing, unless it be verified by affidavit.

Mr. *Montagu* for petitioner.

Mr. *Bethel* for respondent.

SAME CASE.

Affidavit of service of petition ought to be in Court.

The COURT said, that where a petition is called on, the affidavit of service on the opposite party ought to be in Court, but in this case they allowed an order to be taken in the absence of the respondent, upon producing the affidavit of service to the Registrar on drawing up the order: but if the affidavit of service then appeared not to have been sworn before this day (the day of hearing) then the petition to stand dismissed.

1832.

June 18.
Southampton Buildings.

Where a former memorandum of Commissioners finds that a sum of money is in the hands of one assignee, and directs it to be invested in the names of all three assignees, which however could not be done, as the money was not forthcoming; the Commissioner is not warranted in finding by a subsequent memorandum that the money is in the hands of all three assignees, and thereupon ordering them to divide it; and this Court has no jurisdiction to enter on the liability of the co-assignees to answer the consequences of trusting the assignee in default.

Semble, That where one assignee had obtained an order to discharge himself from the office (which was not drawn up) but the Commissioners had, by their memorandums, virtually recognized such discharge by excluding his name from them, he cannot be made liable by any subsequent memorandums.

Ex parte WALTER LEARMOUTH.—In the matter of THOMAS THOMPSON and JOHN KNIGHT.

Ex parte HENRY CLEAVER.—In the same matter.

THE petition stated that a commission issued against the above bankrupts in November 1827, and in December following, *Charles Dod* the petitioner, *Henry Cleaver*, and the petitioner *Walter Learmouth*, were chosen assignees in the usual form. Soon afterwards, differences arising between the first two named assignees and the petitioner *Learmouth*, he, in the same month, presented a petition to the then Lord Chancellor (*a*) praying to be discharged from the trust, which petition was set down for hearing before the Lord Chancellor in January 1828. On the 22d April 1828 the Commissioners named met for the purpose of auditing the accounts of the assignees, and *Dod* and *Cleaver* alone attended the meeting and delivered in their accounts, and the Commissioners signed the usual memorandum, in which *Dod* and *Cleaver* were alone named as assignees, and styled "the two acting assignees." On the same day the Commissioners audited the accounts of the separate estates of each bankrupt, and memorandums of such audit in similar terms were signed by them. On the 4th November 1828 the Commissioners again met for the purpose of auditing the accounts of the assignees, and then also *Dod* and *Cleaver* alone attended and delivered in their accounts; whereupon the Commissioners signed another memorandum to the same effect as that before mentioned; and they found "*there is now a balance of* 1326*l. in the hands of the said assignees*," &c. On the 14th No-

(*a*) Lord Lyndhurst.

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Ex parte Learmouth.

vember 1828, the Commissioners made a further order of dividend, and signed the usual memorandum, wherein the assignees were not particularly specified, but the term " assignees" alone used.

The petitioner *Learmouth* was not present at any of the meetings. The accounts delivered in were those of *Dod* and *Cleaver* only, and signed by them, the petitioner *Learmouth* never having signed any such accounts, nor being in any manner party or privy to them.

The petition to discharge the petitioner *Learmouth* from the office of assignee was heard before the V. C. in April 1829, when the order was made, but was entered in minutes only, never being drawn up; the petitioner considering that it was unnecessary, as the estate was then nearly wound up.

On the 4th June 1830, *Dod*, in pursuance of a summons to show cause why a dividend was not made of the separate estate of the bankrupt *John Knight*, appeared before the Commissioners, and deposed that there was then in the three per cent. consols, belonging to the estate of *Knight*, the sum of 759*l.*, and the Commissioners signed a memorandum to the effect that *Dod* being examined, and deposing to the same, they ordered that the 759*l.* should be sold out and reinvested in exchequer bills in the names of *Dod* and *Cleaver*, and the petitioner *Learmouth*, " *the assignees*" for the benefit of the estate. The petitioner *Learmouth* was not present nor summoned to attend that meeting.

Shortly after that meeting, *Dod* absconded, and it was discovered that the statement made by him as to the 759*l.* was false, and that *Dod* had made away with

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the monies belonging to *Knight*'s estate, which had been got in, and were remaining after answering a dividend of 1*s.* 5*d.* in the pound.

On the 16th June 1830, the petitioner *Learmouth* was examined by the Commissioners, and deposed that he had never received or paid any part of the bankrupt's estate, he never having in any manner acted in the trusts except in some mere formal acts, in which the signature of all the three assignees was requisite.

When the new Court came into operation, the commission was transferred to Mr. Commissioner *Evans*, who, without any other audit meeting as to *Knight*'s estate, on the 5th March last, by a memorandum signed, after finding that 786*l.* was in the hands of the "*assignees*," directed the petitioner *Learmouth* and *Dod* and *Cleaver* to pay and divide the same.

The petition prayed that that order might be rescinded as regarded the petitioner *Learmouth*.

A petition was also presented with a similar view by *Cleaver*, which came on for hearing, by order, at the same time.

Mr. *G. Turner* for the petitioner Mr. *Learmouth*, and Mr. *Russell* for the petitioner Mr. *Cleaver*, urged that the order of the Commissioner was erroneous, as charging their clients with the defaults of his co-assignee, Mr. *Dod*. The 6 *Geo.* 4. c. 16. ss. 106. 107. shows that each assignee is to be considered responsible for his own acts alone. Throughout the wording of those clauses this construction holds good; for the assignees are to deliver accounts of what money they have "*respectively*" received. The Commissioner is to ascertain what balance is in the hands of the assignees

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"*respectively.*" So in the case of *Primrose* v. *Bromley* (*a*), Lord *Hardwicke* expressly held that assignees were to be regarded merely as trustees, and were not responsible for each other's acts without there was great negligence in the case. So also in the case of *Adams* v. *Claxton* (*b*) it was held, that a trustee was not liable for a loss by failure of a banker to an agent, in whose hands money was deposited pending the application for a change of trustees.

Mr. *G. Turner*, on behalf of *Learmouth*, contended that the order of the Vice-Chancellor, discharging Mr. *Learmouth* from the office of trustee, and the fact of the application for that purpose and of its issue, must have been sufficiently well known to the former Commissioners, from the circumstance of the several memorandums signed by them having totally disregarded him as being one of the assignees, and that they must have considered him, *de facto*, absolutely discharged, and no longer responsible, and therefore that at least as to Mr. *Learmouth* the last order went too far.

Mr. *Twiss* appeared for one of the separate creditors of *Knight*, and contended that the cases cited did not apply to the present question, which was, whether or not both petitioners had not been guilty of gross negligence in trusting Mr. *Dod* with the sole management of the funds. When money is received by assignees, or by one of them with the knowledge of the others, it is the duty of all to see that the fund is properly applied. When any reasonable time has elapsed after such receipt, the possession of one is considered the possession of all.

(*a*) 1 Atk. 89. (*b*) 6 Ves. 226.

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Where, by the body of creditors, three assignees are chosen, it is the right of the creditors to look to all the assignees, as a triplicate security for due performance of the duties. Mr. *Learmouth*, in point of law, remained assignee, and, as such, liable till he was discharged by order of Court, which could only operate by being regularly drawn up—a step altogether omitted in the present case. Had the order of the Vice-Chancellor been drawn up, and Mr. *Learmouth* regularly discharged, the creditors would in all probability have called a meeting for a new choice of assignees, which would undoubtedly have been their right. By the memorandum of the 4th June 1830, the sum of 759*l.* is ordered to be transferred into the names of all three of the assignees, from whence Mr. Commissioner *Evans* only drew the legal inference that that sum was in their hands, and therefore that they are all liable for it.

The counsel for the petitioners, in reply, were stopped by the Court.

The COURT was of opinion, that whatever neglect the co-assignees might have been guilty of in having trusted too implicitly to *Dod* the management of the trust, it having been found by a prior memorandum of the Commissioners, that the fund now sought to be charged on the co-assignees was in the hands of *Dod* alone, Mr. Commissioner *Evans* had no jurisdiction whatever to throw the responsibility upon Mr. *Learmouth* and Mr. *Cleaver*, and therefore his order must be rescinded. The question of their liability was solely to be determined by a bill in equity, and not by the jurisdiction in bankruptcy; and the Court could not take upon

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themselves to say what would be the result of such suit. An additional reason why the order ought to be discharged, is the circumstance of the Commissioner having proceeded on a former order in making the present one, charging Mr. *Learmouth,* when in point of fact that order was founded on others, which had altogether discharged him from the office of assignee.

The order of Mr. Commissioner *Evans* was therefore directed to be rescinded, without prejudice to the question of the liability of the petitioners. All costs to come out of any estate that might arise.

Ex parte BELL.—In the matter of SMITH.

June 18.

The late receipt of affidavits and consequent non-delivery of briefs to counsel, is no cause for putting off a petition, as the briefs ought to have been delivered without waiting for the affidavits.

AFFIDAVITS in this case were filed on Thursday last, the 14th June, and received by the opposite solicitor on Saturday, the 16th, who stated that Sunday intervening he was unable to prepare and deliver his briefs to counsel till this day, 18th June; yet

The COURT thought it was not a sufficient cause to order the petition to stand over, as the briefs ought to have been prepared and delivered without waiting for the affidavits.

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June 19.

Ex parte SKIPP.—In the matter of SINGLETON.

Form of petition to prove and stay certificate.

THE Court held, that a petition for liberty to prove a debt, and to stay the bankrupt's certificate, if it do not state that the proof will turn the certificate, is insufficient for that purpose.

Mr. *Rolfe* for the petitioner.

Ex parte WIGGIN.—In the matter of NICHOLLS.

Same day.

Where petition attested according to spirit of General Order, Court will always endeavour to get rid of formal objection by allowing time to amend.

THE petition in this case was attested "Witness, John Smith, New Bridge Street, petitioner's solicitor."

Mr. *Swanston* objected that such attestation was irregular, according to the General Order (*a*), inasmuch as it did not specify to what the attestation of the witness applied.

The COURT however thought, that the signature being attached to the petition must be taken to apply to the signature of the petitioner, and was in substance within the spirit of the General Order, and therefore allowed it to be amended: and declared they would always get over such objections where it appeared reasonable they should do so, by allowing an amendment.

(*a*) 12th August 1809.

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June 19.

Court cannot proceed towards commitment of party for non-payment of costs on the usual seven days order of V. C.

Ex parte FERRIS.

THIS was an application for a four-day order on the respondent to pay the taxed costs, or that he might stand committed. The previous order for payment in seven days had been made by his Honor the Vice-Chancellor.

Mr. *Russell* for the petitioner.

Sir G. ROSE intimated that this Court could not proceed to the commitment of a party upon the strength of an order of his Honor the Vice-Chancellor. The petitioner had therefore better take the first order from this Court for payment in seven days, making a formal application for payment to the respondent in the first instance.

ANONYMOUS.

Same day.

Form of petition to annul fiat.

THE Court intimated, that in petitions to annul a *fiat* it was not necessary also to pray for a supersedeas, though in some instances they had observed this course had been adopted.

Ex parte SARAH MARKS and others, (surviving Executrix and Executors of JOHN MARKS, deceased,) and JOHN ISAAC MARKS, (carrying on business under the firm of S. MARKS and Son.)—In the matter of JAMES MARKS.

1832.

Southampton Buildings, June 21.

Testator by will directs his business to be carried on by his executors, and that when his son *B.* (the bankrupt) attains 21, he should, on performing certain terms, be admitted to a fourth share. *B.*, at the age of 20, enters into another business on his own account, and never claims the right under the will, or performs those conditions:—Held, nevertheless that he had not abandoned the right, and therefore that his assignees have a right to call the executors of the will before the Commissioner and examine them as to the affairs of partnership.

THE bankrupt's father, *John Marks*, by his will, dated the 7th July 1826, directed that his business, which was that of a coachmaker, in Great Portland Street, and was then carried on by himself and his son *William Marks*, should be continued after his decease by his wife *Sarah Marks*, and his said son *William Marks*, upon the terms specified in certain articles of copartnership entered into between himself and his son *William Marks*, until his son *James Marks*, the bankrupt, should attain the age of 21, for their own use and benefit, in the following proportions, namely, three-fourths of the annual profits to his wife, and one-fourth to his son *William Marks*. And when *James Marks*, the bankrupt, attained 21, then he directed that he should be admitted to a fourth share in the business, upon the terms set forth in the said articles of partnership, on his taking part of the stock in trade at a fair valuation, and paying interest for the amount thereof after the rate of 5*l.* per cent. per annum, until the principal should be paid: and the testator directed that his two sons should, in consideration of the large sums which had at various times been expended by him in improving the premises where the business was carried on, pay to his executors the yearly sum of 400*l.*, being one-half of the rent of the premises, for the benefit of his estate, so long as they should continue to carry on the business. And in the event of the death of his wife, then the testator directed that the whole of his

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Ex parte MARKS and others.

business should be carried on by his two sons, *William Marks* and *James Marks* (the bankrupt). And in case of any dispute between them touching the carrying on of the business, the testator directed that his executors should offer such a sum of money as they in their discretion should think just, as an equivalent to his son *William*, it being the testator's wish that his son *James Marks* might have the refusal thereof, in consequence of the premises having been originally in the tenure of his late godfather, and out of respect to his memory. But if *James Marks* should decline the business, then the executors were directed to pay to his son *James Marks* such a sum of money as they would have paid to his son *William Marks;* and upon payment of such sum the whole of *James*'s interest in the business was to cease and determine. There were other provisions in the will as to the admission of the testator's younger sons into the business, in case of his wife, or *William*, or *James Marks* declining it, or the wife marrying again; in which last event the executors were directed to invest 2000*l.* in the funds for her benefit, and apply the residue of his estate for the benefit of his children, in equal shares; those of the sons to be payable at the age of 21, and those of the daughters to be payable at that age, or on marriage. And the testator appointed his wife and three other persons executrix and executors of his said will.

By a codicil to his will, dated 21st June 1827, the testator, after setting forth that the copartnership between himself and his son *William Marks* had been recently dissolved, revoked so much of his will as related to *William Marks*, but in other particulars confirmed his said will. And by another codicil, dated

6th June 1828, the testator settled the share of one of his married daughters upon herself, independent of her husband, but made no other alteration in his will.

The testator died in the month of August 1828, leaving his wife and ten children surviving him, of whom the petitioner, *John Isaac Marks*, and the bankrupt *James Marks*, were two.

It appeared from the proceedings in an amicable suit by the executors against the children, that *James Marks*, the bankrupt, had at his father's death three years more of his apprenticeship to serve, and was incompetent therefore to be admitted a partner in the business, and that *Sarah Marks*, the widow, from her want of knowledge, and in consequence of her domestic duties, was unable to carry it on, and that the other executors were also unable to conduct it. It was agreed therefore, under the sanction of the Court of Chancery, that *John Isaac Marks*, who had long since attained 21, should be admitted to purchase a fourth share in the business, and should carry it on for the mutual benefit of himself and the several other persons interested therein, until the bankrupt *James Marks* should attain 21, when he was to be admitted a partner according to the will.

In May 1831, *James Marks* the bankrupt, being then 20 years of age, ceased attending to his duties in Great Portland Street, and commenced business on his own account at Hampstead as a horse-dealer. On the 19th August 1831 he attained the age of 21, and took a lease of some premises in Foley Place for the purpose of carrying on such last-mentioned business, and never claimed any right to any interest as a partner in the coach-maker's business under the provisions of

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his father's will, nor performed any one of the conditions to entitle him to such interest. The term of his apprenticeship expired on the 31st December last, but he performed none of the duties of an apprentice since the month of May preceding.

On the 21st January 1832 a *fiat* issued against the bankrupt, and assignees were duly appointed; and the petitioners were on the 2d May summoned to appear before the Commissioner at the Court in Basinghall Street, to be examined under the *fiat*, and were required to produce all books of account, and all papers and writings relating to the property of the testator *John Marks*, or his business of a coach-maker, which was then carried on by the petitioners under the firm of *S. Marks and Son* in Langham Place. The petitioners attended before the Commissioner, but objected to being examined concerning the business carried on by them subsequently to the testator's death, on the ground that the bankrupt had no interest in it; and after much discussion the Commissioner adjourned the proposed examination, to enable the petitioners to obtain the opinion of this Court.

The petitioners prayed, therefore, that the Commissioner might be restrained from proceeding with the proposed examinations of the petitioners, inasmuch as the bankrupt had no interest in the partnership.

Sir *C. Wetherell* and Mr. *Montagu* for the petitioners. The assignees of *James Marks* the bankrupt can have no right to the inspection of the accounts of the executors of *John Marks* the testator, who are directed to carry on the business upon the trusts mentioned in the will. The property of the testator being

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vested in them as executors, is *in custodiâ legis*. [Sir *J. Cross*. From the very general terms in which the 33d section of the 6 *Geo.* 4. c. 16. is worded, perhaps it will come to the question, whether the bankrupt had any estate or interest in this property.] Whatever interest he might have, the parties ought in this case to be referred to the Court of Chancery, where there is already a suit depending to settle their respective rights, for that Court can order all parties claiming any interest to come before it, and direct the proper inquiry. Such a proceeding was never heard of under a commission of bankruptcy, as to examine executors upon all questions relating to the estate of their testator, merely because the bankrupt took some undefined and uncertain interest under the will. In all matters of account between partners, the proceeding ought to be by bill. But suppose this Court has a concurrent jurisdiction as to these matters of account, the bankrupt in this case was not entitled to a sixpence, *quâ* partner, but under the will. [Sir *J. Cross*. The partnership was to continue till *James Marks*, the bankrupt, came of age, which was on the 18th August last. How was the partnership afterwards carried on?] Precisely in the same way as before. Although the Court will not interfere with the duty of the Commissioners, by making an order upon them to do a particular act; *Ex parte Farr* (*a*): yet it will in its discretion restrain them from doing an act, which may be injurious to the rights of others, and is moreover beyond the scope of their authority. But the main question here is, whether the assignees have any interest in this partnership. The bankrupt had clearly none before attaining the age of twenty-one. And

(*a*) 9 Ves. 513.

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even when he attained that age, the testator directed he was only to be admitted a partner *sub modo*, that is, upon the same terms and conditions as are specified in certain articles of partnership. But these terms the bankrupt has not complied with. Part of the conditions was, that he was to purchase a quarter of the stock in trade, which he has failed to do. Besides, the bankrupt himself never claimed any interest in the concern as a partner; but set up as a horse-dealer on his own account in some other place, quite distinct from the business of the partnership. Here is a conditional power to become a partner, which the bankrupt has repudiated; he has not done any one thing he was required to do by the will, as a condition precedent to his being admitted to any share in the partnership. It will be for the other side to make out what possible interest *James Marks* the bankrupt can have in the partnership business carried on by the petitioners.

Mr. *Swanston* for the assignees. The counsel for the petitioners rested their objections in the first instance, to an examination before the Commissioner, not on the want of interest, but on the existence of the suit. It appears plain, that the bankrupt has an interest in the concerns of this partnership, however obscurely the will may be worded. Can it be denied, that he has still the option of becoming a partner, and that he is entitled to information respecting the affairs of the partnership before he makes his election? But supposing that he has not an option to become a partner, he has still an interest in the residue of the testator's property; for the codicil of the 21st June 1827 expressly directs that the whole of *William*

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Marks's estate and interest in the partnership should fall into and be considered as part of the residue of the testator's estate and effects. How is it possible to restrain assignees from prosecuting inquiries which the legislature has imposed on them? As to the existence of the suit in Chancery, all that has been done in that proceeding is substituting *John Isaac Marks* as a partner in the room of *William Marks*. But even supposing that that suit would accomplish the objects sought by the proposed inquiry, there is no exception in the Bankrupt Act, that the jurisdiction of the Commissioners is to be excluded because of the existence of a suit. [Sir J. *Cross*. Can you state more particularly the objects of your inquiry?] One of the objects is, to ascertain whether any part of the 400*l*. per annum has been paid.

Mr. *Miller* on the same side was stopped by the Court.

Sir G. Rose.—Can it be doubted for a moment, that the bankrupt had an interest in this partnership after attaining twenty-one, and that his assignees have precisely the same interest which the bankrupt had himself? Sir *C. Wetherell* will, I am sure, admit this proposition, that although a partnership is dissolved by bankruptcy, yet it is no dissolution of a tenancy in common, which was the nature of the bankrupt's interest in this case. Till the concerns therefore of this business are wound up, the assignees, representing the bankrupt, are entitled to any interest which he might claim as one of the tenants in common.

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Sir *C. Wetherell* in reply. [Sir *J. Cross.* Can you propose any reasonable limit to the inquiry which is sought for by the assignees?] We say, that any inquiry will occasion great expense, and be of no use whatever.

ERSKINE, C. J.—The object of this petition is to restrain the Commissioner from examining the petitioners as to the concerns of the business carried on by them under the will of *John Marks*, the testator; and the ground, upon which the ulterior investigation is resisted, is, that the bankrupt had no interest in this business. But it seems admitted, that he had an equitable interest on his attaining the age of twenty-one, up to the period of his bankruptcy. By the will of the testator, *James Marks*, the bankrupt is made a tenant in common in the stock in trade appertaining to this business. Are not his assignees then entitled to know the value and all the particulars relating to the stock in trade? I am of opinion, that as it was the plain intent of the testator to give the bankrupt a beneficial share in the business, it is impossible to say that he has no interest in it, although he has not been formally admitted a partner, and that his assignees have a right to inquire into the value of that interest.

Sir J. CROSS.—It is not disputed, that the bankrupt has some interest in this business, though not exactly defined. Then how can the Court restrain the inquiry, when the extent of the bankrupt's interest remains to be ascertained? Inasmuch as the petitioners can define no limit to the inquiry which we can communicate to

the Commissioner, the order must be general for the dismissal of the petition. But the inquiry will, of course, be private.

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Sir G. ROSE concurred.

The petition was dismissed with costs.

Ex parte DON JOSE MASCARENAS.—In the matter of ANNE DAWSON.

Southampton Buildings. June 23.

Where original petition is filed and affidavits put in, and then petition is amended by adding the name of another party as respondent, those affidavits cannot be read against him.

A party who has been discharged twice under Insolvent Act, and is afterwards bankrupt, and not paid 15*s.* in the pound, cannot have property, and therefore cannot be petitioning creditor.

THIS was the petition of a creditor to supersede the commission issued against the above bankrupt, and to stay the certificate, and that the costs of the supersedeas and of the petition might be paid by the bankrupt and *James Nance* (who was also the petitioning creditor) and *Robert Badham* the assignees. The ground of the application were various allegations of fraud charged against the bankrupt and the petitioning creditor, and that there was no legal debt to support the commission.

Mr. *Clarkson*, for the petitioning creditor, admitted that he could not disprove part of the allegations in the petition, namely, that his client was discharged twice under the Insolvent Act, and was afterwards a bankrupt, and that he had not paid 15*s.* in the pound when he sued out the present commission. Upon which

The COURT said, that the commission must be superseded, as the petitioning creditor could have no pro-

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perty, and consequently could be entitled to no debt upon which he could issue a commission; and they referred to the case of *Ex parte Robinson* (*a*). The prayer of the petition must therefore be granted, as against the petitioning creditor and the bankrupt.

With respect to *Robert Badham*, the other assignee, it appeared that there was no charge whatever against him in the petition: and that after the petition had been presented and answered, the petitioners obtained leave to amend it, by introducing his name into the prayer, with respect to the payment of the costs. The original prayer was, " that the costs of the supersedeas and of and incidental to this application might be paid by the said *Anne Dawson* and *James Nance*," and the only amendment made was by adding the name of " *Robert Badham*" after that of *James Nance*.

Mr. *Norton*, for *Robert Badham*, the other assignee, contended, that as there was no allegation of fraud or misconduct made against him in the petition, he ought not to be held liable for the costs. The sole reason of the petitioner for introducing *Badham*'s name into the prayer of the petition was, that *Badham* was the only responsible person, and the petitioner had no chance of obtaining one farthing towards the payment of the costs from the other parties.

Mr. *Montagu* and Mr. *Swanston* insisted, that as the commission was altogether concocted in fraud, *Badham*, as one of the assignees, was liable for costs. They were then proceeding to read various affidavits, with the view of showing that *Badham* could not be wholly

(*a*) 1 Mont. & M. 44.

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ignorant of the fraudulent circumstances attending the issuing of the commission. But it appearing that all these affidavits had been filed previous to the amendment of the petition (*a*) by the insertion of *Badham*'s name,

The COURT decided that they could not be read as against *Badham*, and that the petition must be dismissed as to him. The order would therefore be, that the commission be superseded at the costs of the petitioning creditor and the bankrupt; but that no costs should be given against *Badham*.

(*a*) See *Ex parte Parks*, Buck, 332; *Ex parte Northwood*, 2 Rose, 246.

Ex parte JOHN SHORE.—In the matter of SAMUEL LUCAS and JOHN SHORE (*b*).

June 27.

A bankrupt having employed *A.*, a solicitor to procure signatures of creditors to his certificate, and then ceased to employ him, cannot oblige his, *A.*'s, clerk to make affidavit of witnessing the signatures without first paying *A.* his costs for such business.

THE petition stated that the commission issued in April 1831, and the bankrupts passed their final examination in August 1831. *James Husband* was the solicitor to the commission, and offered to obtain the signature of the creditors to the petitioner's certificate of conformity, and accordingly obtained the signatures of six creditors. Owing to the delay of which *Husband* was guilty, the petitioner was obliged to take steps for further obtaining the requisite number of signatures himself, and for that purpose *Husband* delivered up the certificate to the petitioner. In April 1832, having, together with those procured by *Husband*, obtained

(*b*) See Anon. 1 Russ. & M. 330.

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the requisite number, the petitioner called upon *James Wyatt*, the clerk to *Husband*, and in *Husband*'s presence, requested him to make the necessary affidavit verifying those signatures which he had witnessed; but *Husband* refused to permit *Wyatt* to make such affidavit, without the petitioner first paying to *Husband* his charges incurred in what he had done. No bill of such charges had ever been given, and the petitioner stated that he had not at present the means of paying them.

The petition prayed that the Court would order *Wyatt* to make the necessary affidavits to verify the signatures which had been obtained and witnessed by him, by the order and under the direction of and as clerk to *Husband*, and that *Husband* might pay the costs of the petition.

The expences that would attend the making the affidavit were tendered to *Husband*, but rejected.

The clerk, *Wyatt*, had also, with a view to making the affidavit, requested the possession of the certificate, in order to compare it with the memoranda in his own private diary of the transactions respecting the signatures, which however the petitioner refused to give him.

Mr. *Swanston* for the bankrupt, the petitioner, contended, that as this application had not for its object the compelling a man to do an act whereby he might become guilty of perjury, and as it was to be regarded in the same light as compelling a man to give evidence by a *vivâ voce* examination, or to answer a bill in equity, it ought to be granted.

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Mr. *Montagu*, for *Wyatt* the clerk, maintained that the Court could not exercise any jurisdiction over him on this petition.

Mr. *Bethell*, for *Husband*, contended that the clerk, as the servant of *Husband*, could not be called upon gratuitously to support the case of the bankrupt. Mr. *Husband* had a right to withold his support, till he was first paid the costs to which he had become entitled in respect of the certificate. It is precisely similar to the common case of a solicitor's lien, which cannot be taken from him prior to payment of his charges, *Ex parte Houghton* (*a*).

Mr. *Swanston*, in reply, cited *Commeril* v. *Paynton* (*b*), *Moir* v. *Mudie* (*c*). If the necessary affidavit had in fact been already made, no one could contend that it could be withheld, even without payment of costs. Here delay was imputed to Mr. *Husband*, which was not sufficiently denied by him, and he stood in a similar light to a solicitor who had refused or declined to act for the client. If the Court thought they could not order the affidavit to be made, still *Wyatt* might be examined as to the fact *vivâ voce*.

The COURT, however, was of opinion, that the petition could not be granted until Mr. *Husband* was paid his costs. If the affidavit had in fact been already made, it was much to be doubted whether it could be obtained out of Mr. *Husband*'s possession without payment, or until a proper undertaking or security for payment of the claim were given. If Mr. *Husband*

(*a*) 1 G. & J. 14. (*b*) 1 Swan. 1. (*c*) 1 S. & S. 282.

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had himself put an end to the relationship, and refused to proceed further, the case might be entitled to a different determination; but as the facts were, the relationship being broken off by the petitioner himself, he could not be entitled to the relief he now sought. There is no law which says, that because a solicitor does not successfully complete that for which he is engaged, he shall not be paid till it is completed. This case is very similar to that of a witness at common law, who is always entitled before he opened his mouth to give evidence, to insist upon being paid his expenses. So in the case of *Lord* v. *Wormleighton*(*a*), a solicitor being discharged by the client, was held not bound to produce the client's papers in his possession, even for the purpose of the cause, till his bill of costs was first paid.

The Court much doubted whether they could entertain any jurisdiction over *Wyatt*, had their judgment gone against Mr. *Husband;* but gave no opinion on that point.

The petition was therefore dismissed with costs; but in respect of the bankrupt's present inability to pay them, the order was directed not to be drawn up till he had obtained his certificate, with liberty to the respondent to apply to the Court in one month as to the costs.

(*a*) 1 Jac. 48.

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Southampton Buildings, June 28.

An official assignee having sent to the petitioner, (who was employed under the commission to sell part of the bankrupt's property) the usual circular, that a dividend was due on his debt, cannot afterwards refuse to pay the same, upon the plea that his accounts for such business done by him are erroneous.

Ex parte ISRAEL ALEXANDER.—In the matter of JOSEPH ELDER.

THIS was a petition under a commission which issued on the 14th September 1831. The petitioner had proved a debt of 125*l.* on a bill of exchange against the bankrupt's estate; and on the 3d May 1832, a dividend had been declared of 11*s.* in the pound, which amounted on the petitioner's debt to 68*l.* 15*s.* After the declaration of the dividend, the petitioner, on the 23d May 1832, received the usual circular notice from the official assignee, Mr. *Abbott*, who had been appointed under the 1 & 2 *Will.* 4. that he might receive the dividend upon application at the official assignee's office on Thursday the 24th May, or any succeeding Thursday, between the hours of twelve and four. In pursuance of this notice the petitioner applied for the dividend; but the official assignee then refused to pay it. This was the substance of the allegations in the petition; and the petitioner therefore prayed that the Court would order the official assignee to pay the dividend forthwith, together with the costs of the application.

There were the usual affidavits in support of the facts stated in the petition; and it was also sworn that after the petition had been presented and answered, the official assignee offered to pay the dividend, but refused to pay the costs of the petition.

In answer to the petition, the official assignee swore, that the petitioner (who was also the petitioning creditor under the commission) was employed by *John Isaac Israel*, the assignee chosen by the creditors, and who the deponent believed was the son-in-law of the

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Ex parte ALEXANDER.

petitioner, to dispose of the bankrupt's estate and effects, and also to get in the debts due to the bankrupt; and that it appeared from an account in the possession of the official assignee, that the petitioner received from the bankrupt's stock and furniture, and from the collection of debts due to the bankrupt, the sum of 1244*l.* 5*s.* 11*d.* That in this account the petitioner had debited the bankrupt's estate with various sums for alleged payments made by him on account of the estate, and also for commission, and for expenses of various kinds, to the amount of 438*l.* 9*s.* 6*d.*, and that the petitioner had accounted to the bankrupt's estate for the balance of 805*l.* 16*s.* 5*d.* That in the exercise of his duty, as official assignee, he examined the different items on the debit side of the account, and many of such items appeared to him to be objectionable; in consequence of which the petitioner was summoned to appear before the acting commissioner on the 17th April, when the petitioner accordingly attended, and the Commissioner, on examining the account, wholly disallowed various items, to the amount of 63*l.* 13*s.* 10*d.*, and directed the petitioner to produce evidence to support other items, to the amount of 48*l.* 18*s.* That the petitioner was again summoned to appear before the Commissioner on the 3d May, when the accounts were audited preparatory to the declaration of the dividend; but he did not attend, in consequence of the death of one of his children; but the solicitor acting under the commission, and who sued it out on behalf of the petitioner, stated to the official assignee, that the amount payable by the petitioner in respect of such disallowances might be deducted from the dividend payable on the petitioner's

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debt. That the petitioner had not produced any evidence in support of the items, which stood over for further investigation, nor made good the amount so disallowed; and that when the petitioner applied to the official assignee for payment of the dividend, the official assignee informed him that he could not pay him until he had made good the amount of the sums disallowed by the Commissioner.

The petitioner, in reply to this affidavit, swore, that all the charges and disbursements he made relating to the bankrupt's effects and the collection of his debts, were fair and reasonable, and such as were usually made by auctioneers for business of the same description. That he never authorized the solicitor to the commission, or any other person, to state to the official assignee, or to any other person, that the amount of the dividend payable to him on his debt might be set off against the sum disallowed by the Commissioner, and that he was prepared at any time, when required by his employer, the assignee chosen by the creditors, to establish the correctness and fairness of the items in his account. And he denied that he was summoned to attend the audit meeting, or at any subsequent time to the 17th April, though he would have voluntarily attended such meeting, had he not been prevented by a severe domestic affliction. And that *John Isaac Israel,* the creditor's assignee, was not the son-in-law, but the cousin of the petitioner.

The official assignee, in answer to this affidavit, swore that he verily believed that *John Isaac Israel,* the assignee chosen by the creditors, was chosen through the influence of the petitioner, with the object to secure to himself the emolument attached to business trans-

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acted under the commission, which he would have been unable effectually to secure, if he had himself undertaken or accepted the office of assignee. That the two most eminent men in business of the same description as that embraced in the account of the petitioner, (which was that of a horse auctioneer,) severally attended before the Commissioner on the 17th April, when the items in the account were examined, and they gave such information to the Commissioner, in answer to his questions, as guided his judgment, and induced him to disallow items to the amount of 63*l.* 13*s.* 10*d.*, and to direct the petitioner to produce further evidence in support of other items to the amount of 48*l.* 18*s.* That the official assignee verily believed that the charges made by the petitioner were not fair and reasonable, nor such as were usually made by auctioneers for business of the same description. That in consequence of an inquiry as to that portion of the sum of 48*l.* 18*s.* relating to advances, the official assignee verily believed that the sums were never expended, and were altogether fictitious. That the petitioner did not, whilst the account was in the course of examination before the Commissioner, demur to his jurisdiction, or question his right to investigate the account. That when the account was delivered by the petitioner to the official assignee, nothing was stated by the petitioner as to the amount having been previously examined by the creditors' assignee, by whom the petitioner stated himself to have been employed. That the petitioner's solicitor, at the meeting before the Commissioner on the 17th April, undertook that his client should attend again on the 3d May,

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which was the reason why a summons was not served on him.

Mr. *Tattersall*, one of the two auctioneers referred to in the last affidavit, also swore that he investigated the petitioner's account, and found several items to be exorbitant and unreasonable, which he stated upon his examination before the Commissioner. That the petitioner had charged in several instances 7½ per cent. commission on the produce of sales, when 5 per cent. was the utmost to which the petitioner was entitled, according to the generally recognized limit of per centage. That the petitioner had charged upwards of 50*l.* in his account for expenses of advertizing, printing, posting and delivering bills, and of preparing catalogues and inventories, and that he ought not to have charged any thing approaching to that sum, 20*l.* being quite as much as the petitioner ought to have charged.

Mr. *Swanston*, for the petitioner, insisted that the official assignee had no such power as had been assumed in this case, being merely a ministerial officer (*a*). Having issued the usual circular to the petitioner, he was as it were *functus officio*, having altogether devested himself of the discretion he had subsequently used. It was his duty to have applied in the first instance to the Commissioner, and to have been guided by his instructions, according to the General Order (*b*), and not have assumed an authority which he had no right to (*c*).

(*a*) 1 & 2 *Will.* 4. c. 56. s. 22.

(*b*) General Orders, xxv. 12th January 1832. See Appendix, xxvii.

(*c*) See also *Ex parte Whiteside*, 1 Rose, 319; *Ex parte Graham*, *ibid.* 456.

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Mr. *Wigram*, contrà, relied on the facts of the case as sufficient to warrant the course adopted by the official assignee.

Southampton Buildings, July 6.

The matter stood over to this day, when the Judges not being agreed in their opinion, they gave their judgments in the following order.

Sir G. ROSE.—In consequence of a difference of opinion in the Court on the subject-matter of this petition, it becomes my duty first to express the opinion I entertain on the question that has stood over for our consideration. It appears to me impossible to contend, that an official assignee can resist an order for the payment of a dividend. It is unnecessary to advert to the usual practice in these matters; but it is unquestionable that before the 49 *Geo.* 3. c. 121. a creditor, at his own option, might bring an action for the recovery of the dividend, or present a petition to the Lord Chancellor; and that it was enough for him to show the order of the Commissioners for the payment of the dividend, the amount of which was considered as so much money had and received to the creditor's use (*a*). In an action of assumpsit brought against the assignee, it was not competent to him to show that the debt ought to be expunged. An improvement was made in this branch of the bankrupt law, and now no action at law will lie against the assignee for a dividend, but all claims of this description were transferred to the

(*a*) By a case cited in *Smith* v. *Duke of Chandos*, Barnard. Ch. Rep. 419, it was held, that if a creditor neglects to receive his dividend and the assignee runs away, he must pursue the assignee as well as he can, for the bankrupt's estate is not liable to him.

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jurisdiction of the Lord Chancellor. If the circumstances of the case were such as not to affect the right of proof, but only the payment of the dividend, no counter-petition was necessary, but a bill in equity was the proper proceeding. The difficulty we have here to deal with is, that resistance is made to the payment of the dividend by a party who has no right to come to this Court to litigate that question. An official assignee is an officer purely ministerial; and the act of parliament holds out no pretence for his coming into Court to dispute the payment of a dividend. The case is simply this: an official assignee is not competent to raise any question on evidence in the bankruptcy like the creditors' assignee. Nor is there any ground for his refusal to pay a dividend, which is so much money of the creditors in his hands, and which the law implies an undertaking by him to pay upon request. The judges are not to depart from the direct issue before the Court, or be diverted by other proceedings. But the Court can, without departing from the issue, look at incidental matters; and in the exercise of its visitatorial authority, which it possesses like that of the Lord Chancellor, it has the full power of moderating the rights and claims of all parties concerned. It is therefore my opinion that the order should be made as prayed, without costs; and that the proceedings under the commission should be impounded, with the view of obviating the temporary advantage gained by the petitioner on the hearing of this petition.

Sir J. Cross.—It is my misfortune, on this occasion, to differ in opinion with the learned Judge who has just concluded his address. This is the first case in

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which the duties of official assignees have been brought before the Court; and it seems to me that the object of their appointment was for the express purpose of meeting such cases as this. The Commissioner is the auditor of all the accounts relating to the bankruptcy; and it appears that at the audit meeting he examined the accounts of the petitioner, whose duty it was to show the validity of his demand; for the onus did not lie on the official assignee to show its invalidity. And I can discover no reason to preclude the official assignee, after sending circular notices to the creditors that they might receive their dividends, from telling the petitioner to wait till an investigation was made into the disputed items of his account. If the petitioner retains, beyond the just allowances that ought to be made to him, a sum equal to the dividend on his debt, out of a fund applicable to the payment of dividends, he has in reality been paid the amount of the dividend to which he was entitled; and the object of the present petition would be to have the dividend paid over again. Mr. *Tattersall*, an experienced person in these matters, swears expressly that a commission of 5*l.* per cent. is the ordinary charge for business of the description performed by the petitioner; and that the petitioner ought not to have charged any thing approaching to the sum charged by him for advertisements and catalogues; and the official assignee also swears, that he verily believes that the charge of 48*l.* 18*s.*, relating to advances alleged to have been made by the petitioner, is altogether fictitious. These circumstances, I think, ought to be investigated by this Court. The duty of the official assignee is in all cases the same as that of another assignee, with the exception of the appoint-

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ment of the solicitor, and directing the sale of the bankrupt's property. For inquiring into the validity of this demand of 438*l.* 9*s.* 6*d.* made by the petitioner against the bankrupt's estate, he is as competent as an ordinary assignee; it is his duty to examine into the truth of these accounts; and if he failed to do so, he would deserve to be dismissed, having been expressly appointed for this purpose. It is the duty of the Commissioner to audit these accounts before the amount is paid; and therefore there is no ground for the petitioner's claim to an unqualified payment of any sum he may think proper to charge. I think that the official assignee has in this case a clear right to set off the sum retained by the petitioner from the amount of the dividend payable to him, and that the petition should be dismissed with costs.

Sir A. PELL.—This is a very peculiar case. There are two main points for our consideration. 1. We ought to be careful of allowing any fraud to be practised against the bankrupt's estate; and 2. It is important that we should ascertain with some degree of precision what are the duties of these officers of the Court. Now that gross fraud has been practised here, there appears to be little doubt. It is indeed only necessary to recur to the facts as stated in the different affidavits, to be satisfied of the truth of that position. [His Honor then went into a statement of the material facts of the case as already detailed in the affidavits.] It appears, then, that the petitioner is the petitioning creditor under the commission, but not (which is usually the case) the creditor's assignee, his relation *John Isaac Israel* being chosen the creditor's assignee. This cer-

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tainly looks very like collusion between the petitioner and *Israel;* for if the petitioner had been chosen assignee, he could not then have obtained the profitable employment of selling by auction the bankrupt's stock and effects, which his connexion with *Israel* secured for him. Then it appears from Mr. *Tattersall*'s affidavit, that the petitioner's charge of 7½*l.* per cent. on the produce of sales is a downright fraud. The petition too is worded in very artful terms; for it states that the Commissioner, on the 3d May, ordered the dividend to be paid; while it appears from a reference to the proceedings and the advertisement in the Gazette, that the meeting was originally fixed for the 6th April, when the Commissioner declared the accounts to be unsatisfactory, and the meeting was adjourned to the 9th April. On this day the Commissioner likewise declared the accounts unsatisfactory, and again adjourned the meeting to the 17th April. Now in the proceedings on the file there is not the slightest vestige of what took place at the meeting of the 17th April; and this, according to my view of the case, is a plain stamp of fraud. My own opinion is, that the memorandums of the proceedings at that meeting have been fraudulently subtracted. However, there was another adjournment to the 3d May, when the accounts were audited previous to the dividend being declared. In the affidavit of the official assignee it is stated, that the Commissioner disallowed items to the amount of 63*l.* 13*s.* 10*d.* There is no contradiction by the petitioner of such disallowance, nor even of the charge against him of attempting to cheat the bankrupt's estate.

With respect to the duties of an official assignee, his conduct ought to be stimulated by the purest sense of

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justice; his chief object is to protect the bankrupt's estate. But it is not enough to say that he meant well; he must act according to law. Now in this case the official assignee knew that the charge of the petitioner against the bankrupt's estate was an improper one, before he issued the circular notice to the creditors for the payment of the dividend on their respective debts. The duty of the official assignee is declared in the several orders issued by this Court, by which he is directed to follow the instructions of the Commissioner under whom he acts (*a*). He is therefore confined to other limits than the creditor's assignee; and it would have been certainly more prudent, if Mr. *Abbott* had in the first instance applied to the Commissioner for directions, before he had refused to pay the dividend. He however makes a *tender* after the filing of this petition; which is, of course, no estoppel to the present proceeding. If Mr. *Abbott* had no discretion but to pay the dividend, his conduct in this instance seems to have been wrong; he ought at once to have paid the petitioner; and the facts proved do not amount to payment, and would not have amounted to a defence of set-off in an action at law. The petitioner therefore being *legally* entitled to the amount of the dividend, I think it must be paid by the official assignee; but his accounts should be rigidly examined, and nothing wrong allowed; nor is he in my opinion entitled to the costs of this application.

ERSKINE, C. J.—I fully concur in the opinions that have been expressed as to the importance of protecting the bankrupt's estate, and that we ought also to protect

(*a*) See Rule 25, App. xxvii.

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officers acting in the discharge of their duty. In this case a resistance is made to the payment of a dividend by an official assignee, whose duty is pointed out by the statute as well as by the orders of this Court. On a view of the proceedings under this commission, the order of dividend does not appear to have been made in the usual form. The order, after reciting that there is so much money in the hands of the official assignee, contains an express direction of the Commissioner to pay the petitioner his dividend. The order purports to be made on rendering an account by the official assignee of monies in *his* hands. But the Commissioner should have treated the money as being in the hands of the *creditors' assignee*. For it is not the official assignee, but the creditors' assignee, who is accountable to the Commissioner for all monies received by him from the produce of the bankrupt's estate. The official assignee had here no interest that could warrant him in refusing the payment of the dividend, nor ought he, without directions from the Commissioner, to have suspended the execution of the Commissioner's order. If an action had been brought by the petitioner against the official assignee for the recovery of the dividend, could the latter have pleaded a set-off, on the ground that the petitioner had money in his hands arising from the sale of the bankrupt's effects? He certainly could not; for the debts are wholly of two different kinds; one being due from the official assignee, and the other due to the bankrupt's estate, which could not be combined in a plea of set-off. This Court should, I think, in the present instance, proceed by analogy to the practice of Courts of law in matters of set-off. And therefore,

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as in cases before the 49 *Geo.* 3. c. 121 (*a*), where an action was brought by a creditor against the assignees of a bankrupt for the amount of a dividend, the assignees could not plead a set-off of money received by the plaintiff to their use; so I think here it is impossible to contend that an official assignee can stand in a different position. It follows therefore, as a necessary consequence, that the official assignee is in this case bound to pay to the petitioner the amount of the dividend payable on his debt. There appears certainly to have been some fraudulent conduct between the petitioner and the creditor's assignee; but this has nothing to do with the simple proposition that the official assignee has a sum of money in his hands for the petitioner's use. There is a wide difference, where the official assignee acts according to his own judgment, and where he takes the advice of the Commissioner (*b*).

(*a*) The 49 *Geo.* 3. c. 121. s. 12, was the first statute that took away the right of action from a creditor against assignees for the recovery of his dividend, and confined his remedy to the proceeding by petition to the Lord Chancellor.

(*b*) And see *Ex parte Loxley*, Buck, 456, and *Ex parte Whitwell*, 2 Rose, 162, which do not seem to have been cited in the argument.

Ex parte CLARKE.—In the matter of SUWERCROP.

June 29.

Where petition is ordered to stand over, and costs of day to be paid by petitioner, it is not usual to draw up the order: therefore the non-payment of those costs is not such an objection as prevents the petitioner from being heard on the future day.

ON a former occasion the hearing of this petition had been ordered to stand over, on the application of the petitioner, and the costs of the day to be paid to the respondents by the petitioner.

Mr. *Swanston*, on behalf of the bankrupt, objected

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to the petition being heard this day, the costs not having been paid according to the order. [Sir *G. Rose.* The order is not drawn up, and therefore the non-payment of the costs forms no objection.] Except by the force of that order the petition would not have been again brought before the Court; therefore that order must be binding on the parties in other respects as though it were drawn up.

Sir G. ROSE.—It is not usual to draw up orders of this nature as to the postponement of petitions, except for the purpose of bringing the parties into contempt, without which the party disobeying is not in contempt. Unless, therefore, the party is brought into contempt, he has a right to be heard upon the other part of the order.

The objection was therefore overruled.

Mr. *Swanston* and Mr. *G. Richards* for the bankrupt.

Mr. *M. D. Hill* and Mr. *Bethell* for the assignees.

Ex parte JOHN BEEBIE MORRIS.—In the matter of JOHN MORRIS, JOHN BEEBIE MORRIS the Petitioner, and THOMAS MORRIS.

July 6.

A. B. and *C.* are bankrupts. Their joint estate pays 9*s.* in the pound; the separate assets of *A.* and *B.* contribute sufficient to make a dividend of 15*s.* in the pound, but *C.*'s separate estate contributes nothing:—Held, nevertheless, he was entitled to allowance under 6 *Geo.* 4. c. 16. ss. 128, 129.

THE petition stated that a commission issued against *Thomas Coleman* and the above bankrupts on the 30th of March 1826, which in 1828 was superseded as to *Thomas Coleman*. *John Morris* died in 1827 uncerti-

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ficated. The petitioner obtained his certificate in 1829. In September 1830 a dividend of 14*s.* 2*d.* in the pound was declared to the separate creditors of the petitioner, and a final dividend on the joint estate, making, with former dividends thereon, upwards of 15*s.* in the pound, had been declared. The petitioner claimed to be entitled to an allowance of 7½ per cent., not exceeding 500*l.*, out of the produce of his estate, to which sum the allowance amounted, and the assignees had funds sufficient to pay it. In consequence of doubts as to the proportion of the allowance which was due to the petitioner, he was advised to petition this Court, the Commissioners having declined to order the assignees to pay the allowance. The petitioner prayed that the assignees might be ordered to pay the 500*l.* and costs of the application out of the funds in their hands.

The following is the statement as to dividends:

	£.	s.	d.		s.	d.
The assets of the joint estate amounted to	45,620	7	10	Paying a dividend of	9	8
Surplus assets of *John Morris* from his separate estate, and applied to the joint estate	23,469	15	0½	Ditto about	5	0
Ditto of *John Beebie Morris*	0	0	0	Ditto	0	0
Ditto of *Thomas Morris*	3,404	10	6½	Ditto	0	9
	£72,494	13	5	Dividends paid on joint estate	15	5

in the pound.

£94,047 2*s.* 10*d.* proved against the joint estate.

The petitioner *John Beebie Morris*'s separate estate contributed nothing to the joint estate.

	£.	s.	d.
His assets amounted only to	928	12	9
His separate debts	1307	18	5

His separate creditors received a dividend of 14*s.* 2½*d.* in the pound.

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Mr. *Twiss* appeared in support of the petition.

Mr. *Wakefield* for the assignees.—The objection arises from a doubt as to the construction of the 6th G. 4. c. 16. s. 129. whether the petitioner is entitled to an allowance of 7½ per cent. or a sum not exceeding 500*l.* in consequence of his separate creditors alone having received a dividend of 14*s.* 2*d.* in the pound, and his assets not contributing anything towards the augmentation of the joint estate of the bankrupts. By the old law there was but one allowance made to partners, which was distributable among them according to the proportion which the surplus of their separate estate paid on the joint debts. The 128th section of the 6th G. 4. is throughout in the singular number, and by the words of the 129th section a partner is entitled to a separate allowance, although his partners may not be entitled. By the 128th section the allowance is directed to be paid if the estate of the bankrupt produces sufficient to pay the dividend therein mentioned; but in the 129th section a different phrase is used, and it seems most unlikely that the legislature should have intended that the allowance to one partner should be paid out of the estate of another partner; which in this case is the more striking, as the partner *John Morris* (out of the surplus of whose separate estate the allowance is proposed to be paid to the partner) will receive no allowance whatever, having died without having obtained his certificate. The assignees, however, have no interest in the question, and merely submit it to the judgment of the Court.

The Court thought that the allowance ought to be

made. The assignees have the duty of administering the allowance as joint estate, and must regard it as joint accordingly.

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Petition granted, with costs of the petition and the costs of the assignees out of the estate.

Ex parte WILLIAMSON.—In the matter of WILLIAMSON.

July 7.

The Court will not, before hearing of petition, decide whether *impertinent* matter in affidavits; but *secus* as to *scandalous* matter.

MR. *MONTAGU* moved that affidavits filed in this matter might, before the hearing of the petition, be referred to the Master, to decide whether they did not contain impertinent matter. He cited *Ex parte Cheesman* (*a*), *Ex parte Simpson* (*b*), and *Ex parte Pelham* (*c*). If the affidavits were answered, the right to a reference for impertinence would be waived. Therefore it was the duty of the Court to ascertain the fact immediately, by a reference before the petition came on to be heard.

The COURT regarded the case of *Ex parte Cheesman* as relating only to scandal, and not to mere impertinent matter. If the impertinence had been alleged to exist in a petition, then the Court might go into it at once; but as it was contained in affidavits it would be necessary to go through them all before any determination could be arrived at as to the existence of impertinence.

(*a*) 2 G. & J. 316. (*b*) 15 Ves. 477. (*c*) 1 Mont. 209.

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The question had better therefore await the hearing of the petition.

The motion was therefore refused.

IN THE SAME MATTER.

A reference for *scandal* was ordered immediately.

Ex parte PARKER.—In the matter of CRICKETT.

July 7.

Where official assignee had been appointed under an old commission, on suggestion that majority of creditors objected to such appointment, the Court, on motion, suspended an order for delivery up of proceedings, &c. to official assignee till hearing of petition.

MR. *SWANSTON* moved that an order which had been made in this matter, which was under an old commission, directing the appointment of an official assignee, and that the chosen assignees should deliver up all papers and books to him (for which purpose a summons had issued), might be suspended. He stated, that by far the majority of the body of the creditors were opposed to that order, considering such appointment as unnecessary, and that the estate was properly managed by the chosen assignees. He contended there was no doubt as to the jurisdiction of the Court to grant this application, according to the 19th rule of the Court. (*a*)

The Court thought the application quite reasonable, and directed the suspension of the order till the hearing of the petition filed concerning it, or until further order; the Court intimating a recommendation to the Commissioner, that in the meantime all proceedings on the summons should be stayed.

(*a*) 1 Dea. & Ch. Rep. App. xxvi.

In the matter of EDWARDS.

July 12.
Order necessary to enable same party to issue a new fiat, where, from mistake in former, it had not been prosecuted in time.

MR. *G. RICHARDS* applied that a new fiat might issue in this bankruptcy, the old one being bad by reason of a mistake in the name of the bankrupt. He stated that the application was necessary to enable the same party to take out the new fiat, as the old one, for the above reason, had not been proceeded with in due time.

The COURT acquiesced in the observation, and granted the application.

Ex parte SHORE.—In the matter of LUCAS and SHORE.

July 12.
Unless certificate of Commissioner be filed, Court cannot order a copy of it to be delivered.

THIS was a motion that the party applying might be at liberty to have a copy of a certificate made by the Commissioner in this matter.

The COURT, however, finding that such certificate had not been filed, refused the motion.

Ex parte SHOULTS.—In the matter of VENSON and SHOULTS.

July 13.
Commissioner directed to sign certificate, although the year was omitted to one of the signatures when it was preceded and followed by dates subsequent to that of the last examination.

MR. *SWANSTON* applied that the Commissioner might be directed to sign the petitioner's certificate. His objection to do so arose from the circumstance of

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the year not being attached to some of the signatures of creditors, as required by the general order (*a*). The signatures objected to were preceded and followed by others which were dated in the present year, subsequent to the bankrupt's final examination.

The COURT thought that the Commissioner was in strictness right, and the certificate was, according to the strict letter of the general order, defective. Yet as it was morally impossible that the signatures could have been attached otherwise than in the proper time, from its being preceded and followed by others dated in the present year, therefore the spirit of the order was complied with, and the formal objection ought to be waived, and the Court desired an intimation to that effect might be conveyed to the Commissioner.

The order was not required to be drawn up, minutes of it being deemed sufficient.

(*a*) 8th August 1809.

Ex parte ALEXANDER and others, Assignees of FRY and CHAPMAN.—In the matter of SWAINSON and MUSTELL.

July 14. Solicitor allowed to sign petition for petitioner under circumstances. Order not to be drawn up, but attached to petition.

MR. *N. ELLISON* moved that the solicitors for the petitioners, as assignees of Messrs. *Fry* and *Chapman*, might be permitted, on behalf of the petitioners, to sign a petition about to be presented to the Court in this matter. He stated that the petitioners living at a great distance from London, and Monday next (the 16th July) being the last day on which petitions could be presented, the Court being about to rise for the vacation,

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it was impossible to obtain the petitioners' signatures before that day would expire.

The COURT granted the application, and said it was not necessary to draw up the order, but that it would be sufficient if it were annexed to the petition when it should be presented.

Ex parte THOMAS BAKER. — In the matter of WILLIAM SELL (*a*).

July 14.

Where a party, by pretence of coming into proposed arrangement with other creditors, protracts the prosecution of a *fiat* over the fourteen days, and then applies for a new *fiat* and to supersede first, even if such second *fiat* be granted, Court will supersede second, and order first to stand: *à fortiori*, if second be not in fact granted, but first is proceeded with, Court will sustain the first under such circumstances.

IN this case the facts appearing on the petition were, that on the 14th of June 1832 one *Fossey*, by Mr. *Turner* her agent, struck a docket against the bankrupt, and procured a *fiat* to be granted, which was directed to Mr. Commissioner *Evans*, to be executed as a town *fiat*. The fourteen days (*b*) for executing it expired on the 3d of July, and in the morning of the 4th of July, Mr. *Gresham*, the petitioner's solicitor, searched the London Gazettes from the 19th of June to

(*a*) See *Ex parte Fletcher*, 1 Rose, 454; *Harrison's* Case, 3 V. & B. 175; *Ex parte Freeman*, 1 Rose, 380; Re *Hayes*, 1 G. & J. 255.

(*b*) The words of Lord *Loughborough's* order of the 26th of June 1793 are, "that any commission of bankrupt which shall be sued out from and after the 26th June instant, and to be executed in the city of London, shall be supersedable (for want of prosecution) at the expiration of fourteen days, and not sooner, after the date thereof." "And that one day shall elapse after the expiration of the said fourteen days before any order shall be made for such supersedeas; and that the application which shall in the course of that day be first made by any other attorney or solicitor than the attorney or solicitor at whose instance the supersedable commission issued, for a supersedeas of such commission, and for a new commission to be issued, shall be preferred to an application for the same purposes by the attorney or solicitor who sued out such supersedable commission."

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the 3d of July for the advertisement of the adjudication of *Sell*'s bankruptcy, but not having found the same, he made the usual affidavit of his having made the search. On the morning of the 4th of July the petitioner lodged, at the Secretary of Bankrupts' Office, the affidavit, together with a petition to the Lord Chancellor praying that the *fiat* issued on *Fossey*'s petition might be annulled, and that a new *fiat* might be issued against *Sell*, upon the petition of the present petitioner, the petitioner striking a fresh docket. *Gresham* bespoke the *fiat* in the afternoon of the 4th, and was then informed by a clerk at the office that the same would be ready for him in the morning of the 5th, but could not be granted sooner.

On the 4th July *Gresham* gave notice to Mr. Commissioner *Evans* that he had presented the petition, struck such docket, and bespoken the *fiat*, and requested him not to proceed upon the *fiat* issued by *Fossey;* and gave notice to the same effect to Mr. *Turner*, *Fossey*'s solicitor. The order on the petition of the present petitioner was laid before the Lord Chancellor for signature at ten o'clock, *a. m.*, on the 5th, and between then and eleven o'clock, a clerk of *Turner*'s went to the Secretary of Bankrupts' Office, and inquired what had been done upon the last-mentioned petition; and was informed that *Fossey*'s *fiat* had been annulled, and that the order and new *fiat* were, as the informant believed, then signed by the Lord Chancellor. About one o'clock *Turner*, notwithstanding, applied to Mr. Commissioner *Evans* to proceed on *Fossey*'s *fiat*, which the Commissioner did, and accordingly adjudged *Sell* a bankrupt. Subsequently, on the same day, *Gresham* applied at the Secretary's Office to know

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if the order annulling *Fossey*'s *fiat* and granting a new one was completed, when he was informed, that in consequence of his having received notice from *Turner* that *Sell* had been adjudged bankrupt, he had recalled the petition for the second *fiat*, and refused to procure the Lord Chancellor's signature to the order made thereon; and he subsequently, on the same day, received from the office the following letter:—

"Sir,—I have seen Mr. *Vizard*, who says he does not feel at liberty to lay before the Lord Chancellor the second *fiat*, but thinks an application had better be made to the Court of Review, on the special circumstances. You are not to be prejudiced by my act.

"Your's, &c. C. ELLEY.

"Secretary of Bankrupts' Office."

On the 19th June an endeavour to procure an arrangement for a composition was made for the general benefit of the creditors, and the petitioner was urged to come into the same. But the *fiat* taken out by *Fossey* was never in any manner prosecuted till the 5th of July, about noon.

The petition therefore prayed that *Fossey's fiat* might be annulled and the adjudication reversed, and that a new *fiat* might issue at the suit of the petitioner, and for costs in all events.

The affidavits in opposition explained the circumstances of the delay, and of the attempt at an arrangement, as far as it respected the merits of the petitioner's application, thus:—After the docket was struck by *Fossey*, the far greater number of the creditors were anxious that an arrangement should take place, so as to avoid the necessity of opening the *fiat;* and at a meeting on the 19th June requested *Fossey* to suspend

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proceedings on it. On the 20th or 21st of June the petitioner called at the office of Mr. *Barham*, (who was an accountant managing the proposed arrangement,) and stated to him that he would consent to whatever the other creditors of the bankrupt might have determined upon. Upon the faith of this representation no notice was given to the petitioner to attend the meeting of the 26th June, at which an agreement was settled and drawn up by the principal creditors, and Mr. *Barham* deputed to procure the signatures of all the creditors to it, which he did, except the petitioner's and those of two creditors whose debts amounted to 60*l.* only. Mr. *Barham* having called several times on the petitioner without being able to find him, called on the 3d of July and communicated to the petitioner the result of the proceedings, and requested his signature, which however the petitioner then declined till he had seen his solicitor. A meeting of Mr. *Barham*, the petitioner, and his solicitor, Mr. *Gresham*, was appointed at seven o'clock on the same evening at the office of Mr. *Gresham*. At that meeting Mr. *Gresham* postponed the final answer of the petitioner, saying that he would in the next morning (the 4th July) see some of the principal creditors, and if they were satisfied with the accounts, he, Mr. *Gresham*, would advise the petitioner to sign the proposed agreement, and appointed Mr. *Barham* to call at half-past four o'clock on the 4th of July. Mr. *Barham* called accordingly, but Mr. *Gresham* was not at home; but a letter was handed to him as follows:—"I have made some inquiries respecting Mr. *Sell*'s affairs, and have reason to be much dissatisfied with the statement he now makes out. Mr. *Baker* will not accede to the proposed arrangement. Your's,

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Wm. Gresham." Previous to writing this letter, the petitioner, through Mr. *Gresham*, had struck the second docket without any intimation of his intention to do so to Mr. *Barham*, and against good faith; Mr. *Gresham* well knowing that if a decided answer had been given on the 3d July, *Fossey's fiat* would have been proceeded on. On the same evening of the 4th July, at half-past six o'clock, Mr. *Barham* again called on Mr. *Gresham*, and still urged the petitioner's coming into the arrangement, when he was informed by *Gresham* that the second docket had been struck, being the first intimation he had received of the fact.

Mr. *Montagu* and Mr. *G. Richards* for the petition. In general cases, at the expiration of 14 days from the taking out the *fiat*, if it be not proceeded with, it is supersedable; and even upon an application prior to the expiration of the 14 days, it requires special circumstances to induce the Court to enlarge the time to open the *fiat; Ex parte Moody* (*a*). And so strictly is the General Order (*b*) followed, that where there had been a delay even by the acts of the bankrupt and by the consent of creditors, the commission was superseded; *Ex parte Luke* (*c*). Another objection is, that the first *fiat* was taken out with a view to effect a composition, which object this Court will not countenance; *Ex parte Dowton* (*d*).

Mr. *Bligh* and Mr. *Swanston* for *Fossey*. The General Order of the 26th June 1793 is not peremp-

(*a*) 1 Deac. & Chit. 34; *Ex parte Freeman*, 1 Rose, 380; *In re Hayes*, 1 G. & J. 255.

(*b*) 26 June 1793. (*c*) 1 G. & J. 361. (*d*) 1 Deac. & Chit. 111.

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tory. It does not direct that the unprosecuted *fiat* is actually *superseded*, but merely says it shall be *supersedable*. Again, the order directs that it shall be supersedable "for want of prosecution." That does not imply that it cannot be prosecuted after the 14 days; so that if, after the expiration of that time, it is *bonâ fide* prosecuted, no objection can be taken to it. In this case there has been prosecution, and though subsequent to the 14 days, the adjudication is now standing, and cannot be annulled. There is therefore no want of prosecution. In all the cases in the books where the intent to prosecute is evinced, even without any absolute prosecution, the commission has always been revived. We are now in possession of the adjudication, which not only indicates an intent to prosecute, but an actual prosecution. The case of *Ex parte Moody* (*a*) is very different from this case, that being for an application to enlarge the time for opening the *fiat*. So also *Ex parte Dowton* (*b*) was a similar application. In the present case we seek no such favour, we having actually proceeded in opening the *fiat*. As to the delay, it has been solely caused by the indecision, whether fraudulent and evasive or not, of the present petitioner, whose apparent intention at least was to have come into the arrangement of the other creditors, but whose real object proves to have been to entrap us over the 14 days, in order himself to have the benefit of taking out the second *fiat*. [Sir *J. Cross*. The words of the order are, that it shall be supersedable if not prosecuted with effect; here it is in fact prosecuted with effect, and no supersedeas has been granted. But as the application to supersede was made before

(*a*) 1 Deac. & Chit. 34. (*b*) *Ibid.* 111.

the prosecution, and the second *fiat* was refused by the officer "without prejudice," we ought to regard the first petitioning creditor as standing now in the same situation as at the time of that application to supersede.] Mr. Commissioner *Evans* had all the facts of the case before him at the time he gave his judgment in our favour, and has determined we are entitled to the *fiat*. The case of *Ex parte Luke* (*a*) will hardly apply to the present case, for there there was no contest about the issuing a second commission. In *Ex parte Freeman* (*b*), and several cases mentioned at the end of the report of that case, the Lord Chancellor, with a view to prevent fraud, actually superseded the second commission which had issued, and renewed the first, which had been virtually superseded. Here there has been gross fraud, and had the second *fiat* been granted, the facts would have warranted the Court to have adopted the course as in *Ex parte Freeman;* and as the facts stand, there is every ground to induce the Court to reject the present petition.

Mr. *Montagu*, in reply, relied on the General Order. If the second *fiat* had been sought for by a third party, there can be no doubt but what it would have been justly awarded to him, and there are no facts strong enough in the present case to vary that right.

ERSKINE, C. J.—If the whole merits of this petition had rested on the mere fact that the adjudication on the first *fiat* had been delayed beyond the 14 days allowed by the General Order, I should have thought it a mere question of practice whether it was not too

(*a*) 1 G. & J. 361. (*b*) 1 Rose, 380; 1 Ves. & B. 41.

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late to supersede the first after it has been opened, even although the refusal of the second *fiat* proceeded from a misconception on the part of the office of the rights of the parties. But one ground of objection taken is, that the first *fiat* was issued out for the purposes of effecting a composition. Under these circumstances, if the second *fiat* had in fact been granted, and an application were made to supersede it, and to revive the first, I should feel myself bound to call on the respondents to show that the latter was taken out *bonâ fide*. But there having been already the judgment of the Commissioner (who was aware of all the circumstances) in favour of the respondents, and the *fiat* being now in full operation, I feel myself bound to call on the petitioner to show that improper objects induced the issuing of the first *fiat*, and that he himself comes *bonâ fide* to annul it. On both these points the petitioner has altogether failed. For here the petitioner has himself, for a while, apparently acquiesced in the proposed arrangement, and evinced no dissent until after the 14 days have expired, and at the very first moment after that time; intimating all the while his desire to come under that arrangement, and requesting, as it were, a delay over the 14 days in order to consider the answer he would give. Under these circumstances I am certainly not inclined to annul the first *fiat*; but I go further, for I feel it right to say, that if the first had been annulled, and the second granted, I should have felt myself bound to have superseded the second, and have revived the first. I therefore think this petition must be dismissed with costs.

Sir A. Pell.—I fully concur in the judgment given.

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The question is, is there a sufficient reason assigned why the first fiat was not acted on in 14 days? I think both those assigned are sufficient: First, that it was sued out with a *bonâ fide* intention to prosecute it: and second, that by an arrangement being proposed, which to the far greater majority of creditors seemed most beneficial to the general interests of the parties, the delay took place in the first instance, and was protracted by the petitioner himself over the 14 days, at the expiration of which, in breach of every species of good faith, and in evidence of his own sinister motives throughout, he himself surreptitiously attempts to sue out a second fiat. I quite agree that had he been successful we should have been bound to have superseded it. I think we cannot regard this case as if a third and innocent party had sued out the second fiat; we are in this instance to be governed by the *bonâ fide* of the transaction, and must dismiss this petition, and in regard to the *mala fides*, with costs.

Sir J. CROSS.—There can be no doubt but that the true construction of the General Order is, not that the first fiat is *superseded*, but that it may be *supersedable*. The fact of adjudication does not seem to me at all decisive on this case. I think that alone could not have operated as an estoppel to the petitioner, because it was made, as it were, without prejudice. But I think the bad faith that has been evinced must bring upon the petitioner a dismissal of his petition, together with the payment of costs.

Sir G. ROSE concurred.

The petition was thereupon dismissed, and with costs.

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July 20.

Where on application for sale of equitable mortgage and liberty to bid, one mortgagee being also an assignee, separate solicitor must be appointed for the sale, and assignees not to have conduct of it.

Ex parte GREENWOOD.—In the matter of JOY.

ON the petition of equitable mortgagees for the sale of the mortgaged premises, and for leave to bid, where one of such mortgagees is also one of the assignees under the fiat,

The COURT, referring to the case of *Ex parte Cowdry* (*a*), directed that the Commissioner should appoint a separate solicitor for the purposes of the sale, and that the assignees should not have the conduct of it.

(*a*) 2 G. & J. 272.

Ex parte ROBINSON.—In the matter of LYON.

Same day. Order nisi only in the first instance made for distribution of unclaimed dividends.

MR. *STUART* applied that certain dividends, which had been unclaimed for the space of three years, and respecting which all the statutory requisites had been complied with (*b*), might be forthwith distributed among the other creditors.

The COURT thought that although it had been usual to make a peremptory order of distribution on the first application, yet it would be better in future to make an order nisi in the first instance, and directed that the costs of the petition and all costs incurred since the last order of dividend, should be taxed and retained out of the fund; and that advertisements should be inserted in three London papers for the creditors to come in for

(*b*) See 6 *Geo.* 4. c. 16. s. 110.

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these dividends within three months, and in default the fund to be divided as prayed (*a*).

(*a*) In *Ex parte Goodhart*, on the 5th November 1832, on application of Mr. *E. Chitty*, the Court declined to make any order till after a final dividend, when very small dividends were unclaimed and advertisements had been inserted and letters sent round to the different creditors, the Court thinking it better to give those creditors the opportunity of applying after the final dividend was declared.

Ex parte BURLES.—In the matter of MAY.

July 21.

Although all creditors, save one, and the bankrupt and assignees consent, the Court cannot direct that the official assignee be at liberty to award a party a remuneration for trouble incurred touching the bankrupt's estate between time of stopping payment and issuing the fiat. Nor can it direct the Commissioner to ascertain if proper.

THIS was a motion by Mr. *Montagu*, which was consented to by the assignees, the bankrupt, and all the creditors, save one, who was willing to abide the order of the Court, that the official assignee might be at liberty, out of the estate, to pay the petitioner the sum of 20*l.*, as a remuneration for great trouble he had been at in the management of the bankrupt's accounts between the time when the bankrupt stopped payment, and the issuing the fiat; his prudent conduct having produced considerable advantage to the estate and a great diminution of expense.

The COURT however thought they had no jurisdiction to interfere; inasmuch as it was a debt due from the bankrupt for business done for him before his bankruptcy. The creditors, if they thought fit, might arrange it among themselves.

Mr. *Montagu* then asked the Court to refer it to the Commissioner to ascertain whether it was proper to be done.

Per Curiam.—We have no such power. Not having jurisdiction over the subject ourselves, it is impossible we can delegate any to another party.

Motion refused.

1832.

July 26.

Where a joint fiat issues against *A.* & *B.*, and the debt is separate, it is void, and the subsequent superseding it as to *A.* cannot make it good as a separate fiat as to *B.*

In such case a petition praying to supersede against *B.* need not state the objection that is relied on (*a*).

Ex parte CLARKE.—In the matter of CLARKE.

ON the 14th March 1832, a joint fiat was awarded against the petitioner *John Clarke* and *Gregory Odell Clarke*, who were partners, and on the 2d May following, the Commissioners declared *John Clarke* alone a bankrupt. On the same day the Commissioners sent a notice in writing, signed by them, to *John Clarke* the petitioner, informing him that a fiat in bankruptcy had issued against him, under which he had been duly declared a bankrupt, and calling on him to surrender on the 18th May and the 15th June following. On the 16th May, however, the petitioner received a letter from the solicitor to the commission informing him that he need not surrender on the 18th, and that he would receive due notice of the next meeting. These were all the facts stated on the petition, which prayed that the fiat and adjudication might be annulled. It also appeared that the other partner had never been adjudged a bankrupt, and the other facts will be collected from the arguments of the counsel.

Mr. *Webster* in support of the petitioner. The question upon which this petition mainly rests is, whether the separate adjudication of the Commissioners against the petitioner is good in law upon a joint fiat, that fiat, as we have reason to believe, not having seen the proceedings, being founded on a separate debt. If that fact is established, it is quite clear that the fiat was void *ab initio*, and cannot now be sustained as a separate

(*a*) But in *Ex parte Chaffey re Chaffey*, 10 November 1832, Mr. *Montagu* for the petitioner, and Mr. *Whitmarsh* for the respondents, the Court were inclined to hold that a petition to supersede must state the ground of objection to the fiat.

1832.

Ex parte CLARKE.

fiat. The petitioner having no power to inspect the proceedings, cannot prove his case, but the proceedings being in the power of the Court, the Court may satisfy its own mind by a reference to them, snd will therefore decide according as the fact is.

Mr. *Swanston* for the assignee and the petitioning creditor. On the face of the petition there is nothing to show the precise fact upon which the adjudication is disputed. There is no proof that the fiat is joint, for the affidavit of that circumstance by the petitioner is no evidence. But if it were evidence, the petition states nothing to show the adjudication bad, and the Court cannot travel out of the petition. This commission has by order, dated 2d June, been superseded as to *Gregory Odell Clarke*, and the bankruptcy was advertised on the 12th June.

Mr. *Webster* in reply was stopped by the Court.

The COURT finding the fact to be that the fiat was joint, and the debt and the adjudication separate, and that the supersedeas as to *Gregory Odell Clarke* did not issue till long after the adjudication, and that no notice of applying for the supersedeas was ever given to the petitioner, thought that the fiat must be superseded. There is no debt on which the fiat is taken out, inasmuch as the fiat is joint, and a separate debt cannot support it. As to the form of the petition in this instance, it ought to be regarded as a mere citation to the other party to appear and support the fiat, and for that purpose it is quite sufficient. There can be no doubt but that a joint fiat cannot be supported by a

1832.

Ex parte Clarke.

separate debt. At law it is quite clear that if it be not supported throughout as joint, it must fall to the ground. The order for superseding as to *Gregory Odell Clarke* cannot, of itself, have the effect of rendering valid the fiat as it now stands against the petitioner. Therefore the petition must be granted and the fiat superseded altogether.

Ex parte Cates.—In the matter of Jackson.

July 26.

Where petition is presented to stay certificate, and petitioner then withdraws his opposition, an affidavit of no collusion is requisite.

THIS was a petition that the certificate might be stayed.

Mr. *Montagu* stated, that his client, the petitioner, had given notice of the intention to withdraw this petition, withdrawing his opposition to the certificate, being satisfied that it ought to go.

The Court ordered the certificate to go, (directing the petitioner to pay the costs,) upon production of an affidavit that there had been no collusion between the parties (*a*).

(*a*) See *Ex parte Gibson*, cited 6 Ves. 5. In *Lawrence re Lawrence*, 8th November, the Court gave a similar intimation. Mr. *Montagu* for the petitioner.

Ex parte Crockwell.—In the matter of Crockwell.

Leave to except to the report of an officer of this Court need not be applied for.

IN this case, a reference had been made to Mr. *Gregg*, the Deputy Registrar, to tax the bill of the assignees. The report had been made, but on the petition to con-

firm the report, exceptions were handed into Court by way of objection to the confirmation.

1832.

Ex parte Crockwell.

Mr. *Montagu* for the petitioner insisted, that the parties opposing had no right to except, not having prayed for leave to do so.

The Court said that where a reference was made to a Master in Chancery, it was undoubtedly necessary to pray leave to except, but that was done out of courtesy and respect to that officer. But where, as in this case, the reference is directed by the Court to one of its own officers, no such rule existed.

The objection was accordingly overruled.

In the matter of Wright.

July 27.

The Lord Chancellor has no jurisdiction to order a fiat to be amended.

Mr. *MONTAGU* applied that the officer of the Court might be directed to deliver out the fiat for the purpose of amendment, an order to amend having been applied for and obtained from the Lord Chancellor.

The Court granted the order, but suggested that the application for leave to amend ought, as the fiat is a record of this Court, to have been made to this Court; no other judge having jurisdiction over its records for any purpose whatever.

1832.

July 27.

On petition to supersede, notice to produce proceedings having been given to the assignees, the absence of such proceedings is not ground for ordering supersedeas *eo instanti*. Petition must stand over at costs of assignees.

Ex parte CLARKE.—In the matter of WITHERS.

THIS was a petition presented to reverse the adjudication and rescind the fiat.

Mr. *G. Richards* for the respondents, the assignees.

Mr. *Swanston* for the petitioner, as a preliminary reason why the petition ought to be granted, stated that the proceedings were not brought into Court, and contended, that unless the assignees came into Court prepared to support their commission by evidence and by the proceedings, the petition ought at once to be granted to supersede it.

The COURT thought that was an insufficient ground to supersede the fiat. No order to produce the proceedings had been made, and even if it had, all the Court would do, was to order the petition to stand over at the costs of the disobedient party, in order that they might be produced.

Ex parte GILES.—In the matter of GILES.

July 28.

Taking allowance under commission does not preclude an application by bankrupt to supersede.

THIS was a petition to supersede the commission at the instance of the bankrupt.

Mr. *Swanston* for the assignees, as a preliminary objection, stated the fact of the bankrupt having acquiesced in the commission by taking an allowance under it.

1832.

Ex parte GILES.

The COURT overruled that objection, observing that it would be too hard to construe such an act into an acquiescence, when a bankrupt, all his property being taken from him, might have no other means of saving himself from starvation.

Objection overruled.

Ex parte WILLIAMSON.—In the matter of WILLIAMSON.

August 2.

Under the 1 & 2 *W.* 4. c. 56. s. 17, a bankrupt cannot proceed on a petition to supersede in this Court, *and also* have an issue at law. He must elect this remedy; and petition being part heard he is precluded from an issue.

IN this petition a question arose as to the bankrupt's right to an issue at law to try the validity of the fiat under the 1 & 2 *Will.* 4. c. 56. s. 17 (*a*). The petition,

(*a*) The words of that section are, "That if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the said Court of Review, such petition to be presented within two calendar months from the date of such adjudication, if such trader shall be then residing within the United Kingdom, or within three calendar months from the date aforesaid if then residing in any other part of Europe, or within one year from the date aforesaid, if then residing elsewhere, or within such other time as the Court shall allow, (not exceeding one year, to be computed from the date aforesaid,) such Court of Review shall proceed to hear and decide on the said petition; or, at the option of the said bankrupt, and on his finding such security for costs (if the said Court shall think fit to require any security) as by the said Court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication by a jury, to be duly impannelled and sworn for that purpose, before the chief judge or any one or more of the other judges of the Court of Bankruptcy; and if the verdict on such issue shall not be set aside, on application made to the said Court of Review, within one month after the said trial, or if the adjudication of the Commissioner shall not be set aside by the said Court of Review on the petition aforesaid, such verdict or such adjudication of the said Commissioner shall in all cases, as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of

1832.

Ex parte WILLIAMSON.

which prayed a reversal of the adjudication and the rescinding of the fiat or for an issue as to the act of bankruptcy, had been, in part, proceeded with on a former day. Mr. *Montagu* now asked that an issue might be granted according to the prayer.

Mr. *Wakefield* contended, that having chosen to go into the hearing of his petition in this Court, the bankrupt had precluded himself from his right to the issue. The words of the act are in the alternative. The bankrupt might either petition, "*or*, at the option of the bankrupt, the Court might direct an issue;" he could not therefore hear his petition in this Court in part, and also have an issue at law directed.

The COURT were of opinion that the words of the act were clearly in the alternative. Having proceeded to the hearing of the petition, the bankrupt had made his election and must be bound by it. And therefore

An issue was refused.

such adjudication, or other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: provided always, that an appeal shall be to the Lord Chancellor from the decision of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only."

1832.

August 9.

Ex parte NUTTING.—In the matter of SHEPHERD.

An order made for taxation and one sixth taxed off. Solicitor applying to confirm and giving notice to petitioner, must pay costs of petitioner's appearance on such application, and also costs of petition and of taxation.

AN order, on the application of the petitioner, had been made on a former day for the taxation of a solicitor's bill. The taxation had been made, and more than one-sixth taken off.

Mr. *Swanston,* on behalf of the solicitor, now applied to confirm the report, the petitioner having been served with notice of the application.

Mr. *Koe* insisted on the right of the petitioner to the costs of this application, as well as the costs of taxation.

Mr. *Swanston* opposed this, on the ground that as the petitioner did not come to make opposition to the application, although served, he need not have appeared, as there was no possible purpose obtained by his appearance.

Mr. *Koe.* We come to see that you do *bonâ fide* obtain the order to confirm, according to the notice served on us to that effect, and are entitled to the costs of confirmation. This might have been a mere scheme to delay our obtaining the confirmation. Had you not moved to confirm, we should have done so.

The COURT was of this opinion, and directed the petitioner to pay the costs of the petition to confirm, as well as those of the taxation.

1832.

Ex parte GILES.—In the matter of GILES.

August 9.

One day's notice of motion to vary order insufficient.

MR. *SWANSTON* moved to vary an order which had been made in this case on a former day as to the payment of costs. It appeared that notice of this motion had only been given to the other side yesterday.

The COURT thought this was not sufficient time, and accordingly ordered the application to be postponed till their next sitting, in order that sufficient length of notice of the motion might be given.

Ex parte ROSS.—In the matter of KIRBY.

Same day.

Personal attendance of petitioning creditor at opening of commission 200 miles off, dispensed with on ground of personal inconvenience.

THIS was an application by the petitioning creditor, that his personal attendance at the opening of the fiat might be dispensed with. The petition stated the fiat to have been directed to be opened at Leeds, where the bankrupt, his principal creditors and the witnesses in support of the fiat resided, and where the property of the bankrupt was situated. The petitioner was a merchant in London, and stated that it would be a great inconvenience to him (his business requiring his personal attendance in London) if he were obliged to go to Leeds to attend the opening of the fiat. The petition proceeded to pray that the Commissioners might be ordered to receive an office copy of the affidavit of the petitioning creditor's debt (made at the taking out the fiat) as a sufficient proof of his debt, at the meeting.

Mr. *E. Chitty,* for the petitioner, urged, that under

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Ex parte Ross.

the combined circumstances of the case the General Order (*a*) might be dispensed with, according to the prayer of the petition. This course had been pursued in *Ex parte Graham* (*b*) merely on the ground of personal inconvenience; and although it had been refused in *Ex parte Williamson* (*c*), where the distance was not more than 40 miles, yet in this case, as the petitioning creditor might have executed the fiat in town, to the great increase of expense and inconvenience of other creditors, yet had procured its execution at the spot most beneficial to the estate, and least so to himself, (as the distance was nearly 200 miles,) and as an injury would probably arise to the petitioner by his absenting himself from his business in London, he trusted that the application would be granted.

The COURT granted the application, observing, that the mere circumstance of personal inconvenience, as stated in the petition, standing alone, would not have induced them to have done so; neither would the fact of the distance alone: but from the combination of circumstances there arose sufficient to warrant their dispensing with the petitioner's personal attendance, by allowing him to prove his debt, not indeed by the original affidavit of debt, as mentioned in the prayer of the petition, but by a fresh affidavit (*d*).

(*a*) General Order, 26th November 1798.

(*b*) Buck, 47. (*c*) 1 Jac. & W. 240.

(*d*) The practice, on such occasions, has, we find, always been to order that the Commissioner *be at liberty* to receive an office copy of the original affidavit as evidence of the debt: and in *Everett* v. *Higgins*, 2 November 1832, on an application of Mr. *K. Parker*, the Court made such an order.

1832.

Ex parte Rose.—In the matter of Rose.

August 9. Attestation thus "*Witness, J. L. solicitor for the petitioner,*" *J. L.* being the country attorney, and petition presented by agent in town: Held, informal. *Quære tamen.*

IN this case a preliminary objection was taken as to the form of the attestation of the petition (*a*). The petition was attested thus:—"Witness, *James Leake*, Solicitor for the Petitioner." It appeared that *James Leake* was the solicitor in the country, and the solicitor employed in presenting the petition was Mr. *Close*, of Furnival's Inn.

Mr. *Bagshaw*, Mr. *Kindersley*, and Mr. *Bethell*, on behalf of three several respondents to the petition, objected that the attestation did not specify to what the attestation related. It ought to have been, "witness to the signature of the petition;" *Ex parte Cracklow* (*b*). Neither was it within the terms of the order, it being witnessed by a party who was not the solicitor presenting the petition, but an agent. And it also merely stated him to be "solicitor to the petitioner," and not "in the matter of the petition;" *Ex parte Clapham* (*c*), *Ex parte Hirst* (*d*), *Ex parte Wilkinson* (*e*). Lord *Eldon* had always upheld the practice strictly on this order, and declared that as the object of the attestation was to throw the responsibility of the petition on the solicitor, he would not afford the solicitor the loophole that any laxity in the practice might afford him, of getting out

(*a*) By the General Order of Lord *Eldon*, 12th August 1809, as to the signature, and attestation of the signature, to petitions, it is ordered, "that the signature of each person signing as a petitioner shall be attested by the solicitor actually presenting the petition, or by some person who shall state himself, in his attestation, to be attorney, solicitor, or agent of the party signing in the matter of the petition."

(*b*) 1 Mont. 353.

(*c*) 1 Mont. & M. 51.

(*d*) 1 G. & J. 76.

(*e*) Ibid. 353.

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Ex parte Rose.

of the consequences of an action at law. On the attestation, as it now stood, it would be impossible for the jury to find a verdict against the solicitor.

Mr. *Swanston*, contrà, in support of the petition, contended that the spirit of the order was here at least complied with; and Lord *Eldon* had, in the case of *Ex parte Titley* (*a*), determined in favour of the attestation on those grounds. The solicitor has sufficiently acknowledged his attestation to fix himself with all the consequences attaching upon a solicitor by the most formal attestation that could be made.

The COURT, however, thought the order had not in strictness been followed, and therefore the attestation was informal; but as they thought the spirit of the order was complied with, they would allow the petition to stand over in order to amend the attestation, provided that it could be proved to be substantially correct at the present time (*b*).

The respondents therefore waived the objection, and the argument on the petition proceeded.

(*a*) 2 Rose, 83.

(*b*) See *Ex parte Wiggins*, *ante*, p. 497. The practice is very unsettled on this point. In *Ex parte Moreland re Moreland*, 2d November 1832, the Court seemed inclined to allow an alteration thus "Witness John Stiles, Solicitor," to be good.

In the matter of ROBERTS.

August 9.

Order, in absence of parties, made on production of affidavit of service.

AN order had been obtained on a petition in the absence of the respondents, subject to the production of the affidavit of service of the petition. The affidavit,

Affidavit drawn informally, but amended. Order *nunc pro tunc*, provided service was originally good.

1832.

In re ROBERTS.

on being produced, appeared to be informal, but had since been corrected.

Mr. *L. Wigram* now moved that the original order might be drawn up *nunc pro tunc*.

The COURT granted the motion, provided the affidavit established the fact, that the original service itself was correct, though the affidavit of it was otherwise. They would not grant the order if the service had been originally informal, and the defect had been supplied by a subsequent service.

Ex parte JOHN BOLTON and SAMUEL NEWTON.—In the matter of GEORGE BAILLIE and JOHN JAFFRAY.

June 2.

Rose, J. absent.

In 1806 *P.* proves a debt against the estate of *B.* & Co. bankrupts, on a bill of exchange, and dies in 1807 appointing *G.* his executor, *G.* becomes bankrupt in 1816 and obtains his certificate in 1817. But before that time, viz. in the years 1811, 1814, 1815, *G.* had, as executor, received three dividends on *P.*'s debt, and in 1817, 1822 and 1828, he receives three other dividends.

THE petition stated that a commission issued against the above bankrupts on the 30th October 1806, under which the petitioners, together with *James Brade*, *Thomas Gudgeon*, and *Duncan Campbell*, were chosen assignees. On the 24th November 1806, *John Parker* proved a debt of 1514*l.* 7*s.* 11*d.* due on a bill of exchange, dated the 19th February 1804, drawn by *William Mackenzie* & Co. on the bankrupts *Baillie* & Co. in favour of *Ogle* and *Walton*, at two months, upon an affidavit filed with the proceedings. The bill was not due at the time of the proof, but became so on the 21st October 1807, and was dishonoured and protested. On the 22d October 1807, *Henry Cox* took up the bill for the honour of

It afterwards turns out that the bill of exchange was paid by another party in 1807, so that no dividend was ever due.

On petition by *B.* and Co.'s assignees to expunge the proof and that *G.* should refund the six dividends:—Held, first, that it being in the nature of a trust the statute of limitations did not run in favour of *G.* But second, that as the first three dividends were paid in error and were a legal debt against *G.* and might have been proved under his bankruptcy, the claim as to them was barred by *G.*'s certificate. The other three, received since his bankruptcy, were ordered to be refunded.

1832.

Ex parte BOLTON and another.

Cockburn, one of the house of *Mackenzie* & Co., and the amount was duly paid to *John Parker*, the holder, the bill, and a receipt signed by the agent of *John Parker*, being now in possession of the petitioners. On the 2d June 1807, a dividend of 1*s.* 3*d.* in the pound was declared on the bankrupt's estate, but, by some omission unexplained, the proof on the bill (though it was paid) was never expunged, so that it was included in the first and every subsequent order of dividend. The dividend of 1*s.* 3*d.* in the pound upon the debt of 1514*l.* 7*s.*, amounted to 94*l.* 12*s.* 11*d.*, but neither *John Parker*, nor his personal representatives since his death, ever applied for payment of the same. *John Parker* died in October 1809, having appointed *Henry Parker* and *William Greenwood* his executors, and by his will having charged his estates with payment of his debts. Since the first order of dividend there had been six orders made, under which *Greenwood* had received all six of the dividends. The petition charged that the receipt of these dividends was, under the circumstances, a fraud on the part of *Greenwood*, and that the petitioners had only discovered that the bill had been paid, and that nothing was therefore due on it within the last six months. The prayer was, that the proof made by *John Parker* might be expunged, and that *Greenwood* might repay the dividends received by him, together with the costs of the petition.

It also appeared, that in May 1816 *Greenwood* had been declared bankrupt, and had obtained his certificate on the 8th September 1817. The further facts will be found in his Honour the Chief Judge's judgment.

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Ex parte BOLTON and another.

Mr. *Swanston* and Mr. *Richards*, for the petitioners, (after noticing that two objections were raised against the petition by the respondent *Greenwood*, namely, his certificate and the statute of limitations,) contended, that *Greenwood* had obtained the dividends by a fraudulent concealment of the fact of the bill having been paid, against which neither of those objections could operate. The original creditor, *Parker*, who proved the bill, and lived till near four months after the first dividend was declared, never having received the dividend, was of itself a strong proof of the fact, that from some circumstance he, in his own mind, knew that none was due, and from which *Greenwood* should have presumed that it was not due. [Sir *A. Pell.* Is not a bill which is proved always presented by the party when coming to receive a dividend upon it?] It is not always so, though it is the proper course. The departure from that course has led to all the difficulty of the present case. Through the omission to expunge the debt after the bill had been paid, the debt, on the face of the proceedings, appeared to be still due; and in consequence, the assignees have been in the habit of sending a circular to *Greenwood*, in the same manner as to other creditors, when a dividend has been declared. In this case the original creditor died in the year 1807. The second dividend was declared in 1811, and this and others were received by *Greenwood* down to the last which was declared, namely, in 1828. In May 1816 he was declared bankrupt. Up to that time, therefore, the statute of limitations had not run. And in *Ex parte Ross* (*a*), and the authorities there cited, it is held, that after the commission has issued

(*a*) 2 G. & J. 46, 330.

1832.

Ex parte BOLTON and another.

the statute of limitations does not operate. The Commission is regarded as in the nature of a trust, which must continue to subsist. A party claiming the benefit of a trust, no reasonable limitation of time will bind him. The maxim is, "once a trust always a trust." The payment of dividends are never considered as absolute indefeasible acts, else why do orders, directing a proof to be admitted, direct that the dividends paid are not to be disturbed? Suppose also the case of a legatee; it cannot be said that bankruptcy and certificate obtained, or the statute of limitations, can be pleaded against him. We contend also, that in this case the dividends have been received by *Greenwood* in fraud: and in such cases it is well known that length of time runs only from the discovery of it. Here the fraud has only been discovered within six months.

As to the plea of the certificate, it is unavailable, because it is a personal demand against the bankrupt, founded on his fraudulent acts. We admit, that generally after an assignment to assignees, the bankrupt is capable as a witness, and therefore being so, cannot properly be made a party to a bill; but where the fraud of the bankrupt raises a claim against him personally, it is different; and in *Mackworth* v. *Marshall* (*a*) a plea of his bankruptcy was overruled. Moreover, in this case he receives as an executor what is improperly received, and creates a debt on the testator's estate, and for the payment of which the testator has appointed a fund, constituting a trust, which subsists till his debts are all paid. Against such a claim no time or personal privilege can run. A representative can be in no better situation than his testator, and it is clear he would

(*a*) 3 Sim. 368.

1832.

Ex parte Bolton and another.

be liable to this estate for refunding the dividends received.

Mr. *Montagu*, for the respondents, submitted that the only remedy in this case is by bill. It is a question of fraud of such a nature, that a petition is not the proper mode of trying it. His certificate is a bar to that portion of the dividends which was received by *Greenwood* before his bankruptcy, inasmuch as it would constitute a debt proveable under his commission. Here, too, *Greenwood* receives the dividends as executor. This Court has no jurisdiction over executors; *Ex parte Crow* (*a*). This cannot be called a case of fraud: it was a mere payment by a party in his own wrong, and a receipt of that payment by a party who conceived he had a right to receive it. He received it in ignorance of the bill having been actually paid. [Sir *A. Pell.* To constitute fraud, it ought to be a receipt under fraudulent pretences. Nevertheless there was nothing to show the least vestige of a debt among the papers of the testator, and an executor ought not to have received the money under such circumstances. He ought to have known that it was not due.] But still I contend there is nothing to show more than ignorance.

Mr. *Swanston*, in reply, insisted that even if there was no fraud, yet still it was the administration of a trust, and no time would run against it, nor would the certificate bar the claim against *Greenwood*.

Cur. adv. vult.

(*a*) 1 Mont. & M. 281.

This day the judgment of the Court was delivered.

1832.

Ex parte Bolton and another.

July 18.

Erskine, C. J.—This is a petition by the assignees of *Baillie*, to expunge a proof made upon a bill which was accepted by the bankrupt; and the petition further prays that the sum of 381*l.* 14*s.* 9*d.*, received by *Greenwood* as executor of *Parker*, may be refunded. The bill in question did not become due till twelve months after the bankruptcy had taken place, when, it having been dishonoured by *Baillie* & Co., *Cox* took it up, for the honour of the drawer, *Mackenzie* & Co. There is no distinct evidence of the payment of the money to *Parker*, but the bill was produced from the custody of the assignees, who had received it from the executors of *Cox;* and a receipt for the money, signed by *Thomas Gudgeon*, was produced, to show that the money was paid to the holder of the bill, who would represent *Parker*. *Parker* died in 1807, but before his death a dividend of 1*s.* 3*d.* in the pound was made on *Baillie*'s estate, which has never been claimed. On the 11th of January 1811 a second dividend of 1*s.* was declared, and the assignees being ignorant of the fact that the bill had been paid, wrote to *Parker* to come and receive this dividend; he being dead, his executor claimed this dividend, and it was paid to him. This is a proof of great want of care on both sides. In July 1814 a further dividend of 1*s.* 4*d.* was made, and in 1815 a third dividend was paid, the three amounting to 252*l.* 7*s.* 10*d.* on the debt. In 1816 a commission issued against *Greenwood*, and he proved against his own estate, as executor of *Parker*. In December 1817, after *Greenwood* had obtained his certificate, a further dividend of 11*d.*, in 1822 another, and in 1828 a further

1832.

Ex parte Bolton and another.

dividend of one halfpenny, were declared on *Baillie*'s estate; the last three amounting to 129*l.* 6*s.* 11*d.* Since payment of the last dividend, the assignees of *Baillie* have discovered that the bill was actually paid in 1807, and they now pray that *Greenwood* may refund the dividends paid to him under the belief that the bill was outstanding. In answer to this demand *Greenwood* sets up his certificate and the statute of limitations, except as to the last dividend, amounting to 3*l.*, which he offers to refund, thereby admitting he has no legal claim to resist the repayment, except the certificate and the statute of limitations.

The questions which arise upon this state of facts are two. First, as to the statute of limitations; and, if that is not a bar, then, second, whether *Greenwood* can protect himself from repaying the three first dividends by his certificate?

As to the first question, looking at the payments in question as made to a creditor whose proof remained on the proceedings, and therefore payments made in the administration of a trust; and considering the other creditors of *Baillie* as interested in the restoration of the money to the estate; adopting the principles that guide Courts of equity in the administration of trust estates, and upon which legatees are made to refund for the benefit of creditors, notwithstanding the lapse of time, or the negligence of the executor; the Court is of opinion that the respondent cannot shelter himself under the statute of limitations, which in such cases is not allowed to interfere with the due administration of the trust estate.

But as the payments made previous to *Greenwood*'s bankruptcy were made by the assignees in ignorance of

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a fact; and the amount at the time of his bankruptcy constituted a legal debt, which the assignees, by expunging *Parker*'s proof, might have been proved, and may still be proved under *Greenwood*'s commission; we are of opinion that as to those sums, amounting to 252*l.* 7*s.* 10*d.* he is entitled to the protection of his certificate under the positive enactment of the Bankrupt Laws; and that the order for refunding must be confined to the three latter sums, amounting to 129*l.* 6*s.* 11*d.* The proof therefore must be expunged, and the sum of 129*l.* 6*s.* 11*d.* must be refunded.

Sir A. Pell.—I am of opinion that *Greenwood* received the money *fraudulently*, and that the statute of limitations does not protect in cases of fraud. This was held in *The South Sea Company* v. *Wymondsell* (*a*), and *Bree* v. *Holbeck* (*b*). I consider this to be a case of fraud, and for the following reasons:—*Greenwood* is executor of *Baillie*, and as such received dividends, which he was bound to apply as part of the assets of the testator; but it appears that he did not do so, but kept the money, and applied it to his own use; that is a fraud, and, on the authority of the cases I have mentioned, prevents the statute acting as a defence. As to the certificate being a bar, I will not give any *decision* on that point; but I am not free from doubts, for I cannot perceive why a certificate should be a bar in a case of fraud, any more than the statute of limitations. The case of *Booth* v. *Earl of Warrington* (*c*), which was an appeal, and all the Judges summoned, is a very

(*a*) 3 P. Wms. 143.
(*b*) Doug. 655.
(*c*) 4 Bro. P. C. 163, Toml. edit.

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strong authority for the position, that the statute of limitations does not run in cases of fraud.

Sir J. Cross.—I concur that the certificate bars the dividends paid prior to *Greenwood*'s bankruptcy. As to the statute of limitations, I am of opinion that it does not apply in cases of petitions in this Court to expunge a proof of debt.

Erskine, C. J.—No doubt the general rule of law is, that the statute of limitations does not run till six years after the discovery of the fraud.

Rose, J. was absent.

Ordered, the proof to be expunged, and to refund the three last dividends, *with costs*.

Ex parte Anne Sammon.—In the matter of Thomas Peirson and William Sammon.

June 6 and 7.

If bills amounting to 1320*l.* be delivered by the drawer to a creditor as collateral security for a debt of 4000*l.*, and the drawer and acceptor become bankrupt, but the estate of the acceptor prove solvent, the creditor is entitled to receive 20*s.* in the pound on the bills against the estate of the acceptor, and also prove the debt of 4000*l.* and receive dividends in liquidation of the remaining portion of his debt under the commission against the drawer.

In this case the firm of *Laing* & Co., being indebted to their bankers, *Reid* & Co. in 4000*l.*, drew two bills of exchange, amounting to 1320*l.*, upon *Peirson* and *Sammon*, who accepted them. *Laing* & Co. then indorsed, and, in the usual course of business, remitted them to *Reid* & Co. as their bankers. Before the bills became due, both *Laing* & Co. and *Peirson* and *Sammon* became bankrupt. *Reid* & Co. proved for the debt of 4000*l.* under the bankruptcy of *Laing* & Co.,

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and received a dividend of 4*s.* 8*d.* in the pound upon the amount of their debt. They also proved the bills under the bankruptcy of *Peirson* and *Sammon,* and received a dividend of 15*s.* 4*d.* in the pound upon the amount of the bills. So that if the bills upon being paid into *Reid* & Co.'s were to be considered as *payment* of a proportionate part of the debt of 4000*l.*, the dividend received in respect of the debt would be a part satisfaction of the bills, and the bills would, by the two dividends together, be fully satisfied; but if the bills were to be considered as *collateral security only* for the debt, and not payment, *Reid* & Co. would still be entitled to receive dividends under *Peirson* and *Sammon*'s bankruptcy until 20*s.* in the pound should have been received from their estate upon the bills, *i. e.* until 4*s.* 8*d.* more should have been so received. *Sammon*'s estate proved solvent, producing a surplus, and the question was, whether *Reid* & Co. were entitled to be paid the 4*s.* 8*d.* in the pound upon the bills (amounting to 308*l.*) out of this surplus, or whether the personal representative of *Sammon* (his widow) was to have this 308*l.* (which was retained in the hands of the assignees) as part of the surplus. Various proceedings had been had in this matter, and especially a reference made to Mr. Commissioner *Fonblanque,* who, by his report dated the 21st of June 1831, found, amongst other things, the facts above stated, and that *Laing* & Co. were entitled to the 308*l.* This was a petition to confirm the report, except as to that point.

Mr. *Montagu,* for the petition, merely stated and relied on the facts.

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Mr. *R. Crowder* and Mr. *Loftus Wigram*, for the respondents. The material question in this case is, whether the bill was given in payment of any specific part of the 4000*l.*, or whether as a collateral security generally. If the bill were payment of any particular part, then a due proportion of the 4*s.* 8*d.* dividend paid by *Laing* & Co. must go towards satisfaction of the bill, and then we could only claim 15*s.* 4*d.* in the pound from *Peirson* & Co., which amount we have already received. But if the bill were a collateral security generally, we are entitled to hold it as security for so much of the debt of 4000*l.* as remains unpaid. *Ex parte Crossley* (*a*), *Ex parte Bloxham* (*b*), *Ex parte Martin* (*c*). That the bill is collateral security generally, and not as payment of any part, is proved by the fact that *Reid* & Co. (as bankers) have a general lien on it for all monies which may become due to them from *Laing* & Co. Suppose *Laing* & Co. when they gave the bill were indebted to *Reid* & Co. in 4000*l.*; that they paid *Reid* & Co. 4000*l.*, and then again became indebted to *Reid* & Co. in a large sum, in such a case *Reid* & Co. would still be entitled to hold the bill; which proves it to be security and not payment. For if it were payment, it would be discharged by the 4000*l.* paid in by *Reid* & Co., and must be delivered up. *Pease* v. *Hurst* (*d*) is an example of a bill being in substance though not in form a general collateral security. Whether we are or are not trustees for *Laing* & Co. of part of the dividend we now claim, is a question between *Laing* & Co. and *Reid* & Co. and cannot be entered into here. 2. In

(*a*) Cook's B. L. 168.
(*b*) 6 Ves. 449. 600.
(*c*) 2 Rose, 87.
(*d*) 10 B. & C. 126.

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fact (though not so stated in the report) the debt of *Laing* & Co. carried interest: that fact, if established upon an inquiry, would give us a new ground, as we should then be entitled to receive dividends from *Peirson* & Co. to the extent of 1320*l.* until the interest on 1320*l.* as well as the principal of that sum should have been satisfied, *Ex parte Martin* (*a*).

Mr. *Matthews* and Mr. *Ching* appeared for other parties.

Cur. adv. vult.

July 14.

ERSKINE, C. J.—*Laing* & Co. being indebted to *Reid* & Co., their bankers, in 4000*l.*, drew two bills of exchange for 1320*l.* upon the bankrupts, *Peirson* and *Sammon*, and indorsed and remitted them to *Reid* & Co. as a collateral security. The bills were accepted by *Peirson* and *Sammon*, but before they became due both drawers and acceptors became bankrupt. *Reid* & Co. proved their original debt of 4000*l.* against the estate of *Laing* & Co., excepting the bills as a security, and proved the bills against the estate of *Peirson* and *Sammon*, and received 15*s.* 4*d.* in the pound from the estate of *Peirson* and *Sammon* on the bills, and a dividend of 4*s.* 8*d* in the pound upon the original debt of 4000*l.* from the estate of *Laing* & Co., amounting to 933*l.* 6*s.* 8*d.* *Sammon*'s estate having eventually turned out solvent, the question arises between *Sammon*'s representative, who is entitled to a large surplus, and *Reid* & Co., whether the latter are to be considered as fully paid upon the bills by the dividends so received from the two estates; or whether they are entitled to a

(*a*) 2 Rose, 87.

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further payment of 308*l.* so as to make up 20*s.* in the pound from *Sammon*'s estate. From the facts stated by the Commissioner upon his certificate, a question is suggested, whether these acceptances were for value, or simply for the accommodation of the drawer. And it was for the purpose of considering whether that fact ought to affect our decision, that I wished the case to stand over. I am now satisfied, that under the circumstances it is immaterial to the question now before the Court.

Taking these bills to have been lodged in the hands of *Reid* & Co. as a security for the floating balance due from *Laing* & Co., and looking at the legal rights and responsibilities of the parties irrespective of bankruptcy, it is obvious that whether the acceptances were for value or not, nothing short of the payment of the bills themselves, or the receipt by *Reid* & Co. of their whole debt of 4000*l.* would afford a defence in an action by them against *Peirson* and *Sammon* on their acceptances. Because, having made themselves primarily liable to the full amount of 1320*l.* as long as *Reid* & Co. were entitled to retain the bills as against *Laing* & Co., which would be till their whole debt was paid, or the bills themselves specifically taken up, so long would their right to recover against the acceptors continue: and having taken the bills *bonâ fide*, and for a valuable consideration, it would be no defence that they were originally accommodation paper, even if it had been known so to be by the holders (*a*). If, indeed, the original debt had been reduced below the sum of 1320*l.*, the fact of their being accommodation acceptances might limit the amount of damages to the

(*a*) *Smith* v. *Knox*, 3 Esp. 46; *Charles* v. *Marsden*, 1 Taunt. 24.

balance still due; but as the balance due to *Reid* & Co. is far beyond the sum now sought to be recovered, that point does not arise.

Then, is the legal liability of the acceptor in any way affected by the bankruptcy of the parties? *Sammon*'s estate being now solvent, his bankruptcy cannot affect the question. What is the effect of the bankruptcy of *Laing* and Co.? It prevents *Reid* & Co. from receiving a larger proportion from the bankrupt's *estate* than the rest of the creditors; but it presents no obstacle to their recovering from other parties upon the securities in their hands, although by so doing, they in fact receive altogether a larger portion of their debt than those creditors, who have no security to resort to. The most that could be gained by treating the bills in question as mere accommodation paper, would be to entitle the acceptors to stand in the same situation which the drawers would have occupied if it had been a bill for value. And even then a question might arise, whether this effect would be produced, without proving the holder's knowledge of that fact. But, assuming that it might, the acceptors could not be in a better position than the drawers. Would the assignees of *Laing* & Co. be entitled to consider the bills as fully paid, and require them to be delivered up to them; and could they insist upon the amount of the bills being expunged from the proof, and the payment of dividends only on the remainder of the original debt? If the bills had been fully paid by the acceptors, they might; or if they had been partly paid by the acceptors, and the assignees were to pay the unpaid balance specifically on the bills, they might, according to the case of *Ex parte*

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Burn(*a*). But the dividends here from *Laing* & Co.'s estate were not paid specifically on the bills, but upon the debt generally. Could they now treat that payment, as if made specifically on the bills? If they could, then would arise the question, which would give importance to the consideration for the acceptance, namely, would an accommodation acceptor have the same right so to treat that payment? If I had been left to consider the case upon general principle only, I should have had no doubt that *Laing* & Co. could not treat this as payment on the bills; because, having remitted them as a general security for the balance of the debt, and the dividend having been paid on the debt, and not specifically on the bills, the creditor would have a right to appropriate the securities to the balance left unpaid. But the decision of his Honor the Vice-Chancellor in the case of *Ex parte Rufford* (*b*), which I mentioned in the course of the argument, induced me to pause, because I was unwilling, without due deliberation, to treat as erroneous the decision of a learned judge, for whose opinion I entertain the highest respect. Upon the best consideration, however, that I have been able to give that case, I am satisfied that it is at variance with the general principle and the authorities bearing on the subject, and cannot be supported. If the order had been right in restraining the payment of the dividends, it should have gone further, and ordered so much of the debt to be expunged. For the only principle upon which it could rest would be, that the payment of a dividend on the whole debt, was tantamount to the payment of that proportion on the bills; and if so, the

(*a*) 2 Rose, 55. (*b*) 1 G. & J. 41.

bills would have been fully paid. The case of *Ex parte Burn* would have warranted the reduction of the proof by expunging the amount of the bills. But it seems to me, that as *Laing* & Co., if solvent, would have had no right to appropriate a payment made upon the debt generally, to the redemption of the bills lodged by them with *Reid* & Co., as a security for the balance of that debt; so, neither could their assignees be entitled so to do, though the amount was calculated upon a pound rate. Still, in substance and effect, the dividend of 4*s.* 8*d.* in the pound was but the payment of 933*l.* 6*s.* 8*d.*, leaving a balance far beyond the amount of the bills due to *Reid* & Co.; and if those bills are to be taken as a floating security for the balance, neither in law, nor in justice, can the holder's claim against the acceptor be diminished by the circumstance, that the instalment received from the drawer was calculated at a pound rate upon the whole debt, not with the view of appropriating any specific sum to the redemption of the bills, but merely for the purpose of regulating the proportion which each creditor should receive from the bankrupt's estate. And such being my opinion, I concur with the other judges who heard this case, in thinking that it will be unnecessary to institute any inquiry into the consideration for the acceptances. The order must be, therefore, for the payment of the 308*l.* to *Reid* & Co. and for the conveyance of the estate to Mrs. *Sammon* as arranged upon a former day, and the costs out of the estate.

The rest of their Honors concurred.

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MEMORANDA.

DURING this interval his Honor Sir ALBERT PELL departed this life, at his residence in Harley Street, after a short illness.

September 13. On this day his Honor the Chief Judge (the other Judges being absent from London for the vacation) sat in Southampton Buildings, for the purpose of hearing those petitions in which the parties consented to be bound by his judgment alone as effectually as if a full Court had been present (*a*).

(*a*) By the terms of the 1 & 2 *Will.* 4. c. 56. s. 2. not less than three Judges are required to be present to form a Court.

Ex parte Fox, or BURNELL.—In the matter of BENNETT and ROBINS.

Same day.

Time of opening a fiat enlarged, where witness in support of the bankruptcy keeps out of the way and is summoned by the Commissioner to attend on a future day.

MR. *MONTAGU* applied that the time for opening the fiat in this bankruptcy might be enlarged for a month. He stated, that by reason of the witness to support the fiat refusing to attend, although her expenses had been tendered, (she being the mother-in-law of the bankrupt,) the petitioner was unable to proceed to adjudication, and in consequence the Commissioner, to whom the fiat was directed, issued his summons and warrant to the witness to enforce her attendance. He therefore trusted the time would be

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enlarged till the result of the summons and warrant was ascertained.

Erskine, C. J.—This being an ex parte application, and a matter not brought on by consent, all I can do, in the absence of the other Judges, is to notify that I think the application reasonable (*a*).

(*a*) This application was renewed on the 27th September, before their Honors the Chief Judge, Sir J. Cross, and Sir G. Rose, and granted.

Ex parte Wright.—In the matter of Chamberlain.

September 13.

Though assignees consent to abandon property under equitable mortgage, yet the Court requires an affidavit to show that such abandonment will be for the benefit of creditors.

THIS was the case of an equitable mortgage.

Mr. *Montagu* applied on this petition, that the assignees might be declared to have abandoned all interest in the mortgaged premises.

Mr. *E. Chitty* appeared to consent on behalf of the assignees. He stated that the premises in question were not worth the amount for which they were mortgaged, and therefore the creditors would be benefited by giving up all interest, since the creditor would otherwise have liberty to prove against the estate for the deficiency in value.

Erskine, C. J.—I can only make this order on production of such an affidavit as should satisfactorily prove that the proceeding would be for the benefit of the creditors.

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September 27.

THEIR Honors the CHIEF JUDGE, Sir J. CROSS, and Sir G. ROSE, came to town to hear and decide any matters that were of immediate importance.

Ex parte PEARSE.—In the matter of FOXWELL.

Petition to stay certificate and for liberty to prove, should state grounds on which Commissioner rejected the proof, and Court will not give time to amend.

THIS was a petition to stay the certificate, and for leave to prove.

Mr. *Keane* for the petitioner.

Mr. *Rogers* objected, that the petition did not state the ground on which the Commissioner had rejected the proof. He contended that the petition should contain all the facts and circumstances necessary to enable the Court to decide whether the prayer of the petition should be granted or not. And in cases where the petition is in the nature of an appeal from a decision of a Commissioner, it should state not only the facts and circumstances which were laid before the Commissioner, or the Commissioner's decision, but also the grounds for his decision; *Ex parte Schmaling* (*a*), *Ex parte Wilson* (*b*), *Ex parte Curtis* (*c*). Nor ought the Court to give time to amend a petition to stay a certificate, more especially as it was filed in vacation; and had it been properly drawn, the Court might at once have seen whether the prayer was proper, and as sufficient delay was already caused by the mere filing the petition.

The Court coincided in this opinion, and therefore

Dismissed the petition.

(*a*) Buck, 94. (*b*) Cox, 308. (*c*) 1 Rose, 274.

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ABANDONMENT OF RIGHTS.

Though assignees consent to abandon property under equitable mortgage, yet the Court requires an affidavit to show that such abandonment will be for the benefit of creditors. *Ex parte Wright, re Chamberlain*, 1832. 1 Dea. & Chit. 573.

A. was entitled to commission for introducing to a tradesman a purchaser for his business, which was to be paid on the completion of the bargain. After he had introduced the purchaser, but before the matter was settled, he became bankrupt, and his assignees brought an action for the commission, which they afterwards discontinued, and wrote to him, saying that they dis-

claimed all right to the money. *A.* upon this brought an action in his own name:—Held, that he was not entitled to recover. *Hillary* v. *Morris*, 1831. 5 Car. & P. 6.

ABATEMENT OF DIVIDEND.

B. and *G.* carry on business at Manchester as commission agents under the firm of *B.* & Co.; *G.* being also a trader on his own separate account at Stockport, under the firm of *G.* & Co., and being likewise a partner with *J.* in London, trading under the firm of *J.* & Co.; and with *S. R.* at Stockport, trading under the firm of *S. R.*; *B.* & Co., drew two bills upon *J.* & Co., payable to the order of *B.* & Co., which *J.* & Co. accept, and which were afterwards indorsed by *B.* & Co., *G.* & Co., and *S. R.*; and of which *W.* & Co. became the holders for a valuable consideration, without any knowledge that *G.* was a partner in the house of *B.* & Co., or in that of *J.* & Co.; *B.* & *G.* and *J.* severally became bankrupt:—The judges were equally divided on the question, whether *W.* & Co. could prove the amount of the bills both against the joint estate of *B.* & *G.* and the separate estate of *G.*, or whether they must elect:—But held, *per tot. Cur.*, that the amount of dividends which had been previously declared, though not received by *W.* & Co. under the commission against *J.*, must be deducted from such proof. *Ex parte Moult and others, re Barrow*, 1832. 1 Dea. & Chit. 44. *S. C.* 1 Mont. 321. Judgments of *Erskine*, C. J., and *Rose*, J., adopted on rehearing before the Lord Chancellor.

ABATEMENT AND REVIVOR.

The 45th sec. of the statute 6 *Geo.* 4. c. 16. imposes a penalty on the provisional assignee, if he does not deliver up the bankrupt's estate to the ultimate assignee. The 67th section enacts, that the suit is not to abate by the death of an assignee, but that it may be prosecuted in the name of the new assignee; and by the 100th sec. the sum recovered for a penalty under the act is to be divided among the creditors. An assignee having died, and a suggestion of his death entered upon the record:—Held, that the succeeding assignee was entitled to proceed in a suit which had been commenced by his predecessor against the provisional assignee for a penalty:—Held, also, that as the assignment to the provisional assignee was recited in the assignment to the second assignee, it was not incumbent on the plaintiff to produce it in evidence. *Bates* v. *Sturges*, 1831. 5 Moore & P. 568.

ACCOUNTANT.

An accountant, who has been employed in a bankruptcy, has no lien on the bankrupt's certificate for the payment of his costs. *Anon.* 1831. 1 Russ. & M. 330.

ACQUIESCENCE.

See also LEASE—ELECTION.

Signing a deed reciting the bankruptcy, &c., is an acquiescence in the validity of the commission. *Ex parte Hall*, 1831. 1 Mont. 354.

If the assignees of a bankrupt attend meetings under a reference to which the bankrupt was a party, and make no objection to the proceedings, they will be considered as adopting them, and be bound by the award. *Dod* v. *Herring*, 1830. 1 Russ. & M. 153.

ACT OF BANKRUPTCY.

A trader, having been denied to a creditor who called for money, was, after a little time, seen peeping over his wife's shoulder. Upon another occasion, seeing a creditor coming, he retired behind a partition at the back of his shop, and his wife coming forward said he was not at home:—Held, that a jury were properly directed to consider whether a trader "*had kept his house;* had wilfully secluded himself; that is, had withdrawn himself from part of the house, where he was likely to meet a creditor, to a more retired part." *Key* v. *Shaw*, 1832. 8 Bing. 320.

A commission cannot be supported by an act of bankruptcy, by *lying in prison*, unless the trading were before the imprisonment. *Ex parte Lynch, re Lynch*, 1832. 1 Mont. 453.

Under 6 *Geo.* 4. c. 16. a *transfer of goods* in satisfaction of a bonâ fide debt, made voluntarily, and in contemplation of bankruptcy, is an act of bankruptcy, and not protected by the 81st section, though made more than two months before a commission issues. *Bevan* v. *Nunn*, 1832. 9 Bing. 107.

An *insolvent's petition is said to be filed* when it reaches its place of final custody, and not when it first comes to the hands of the officer of the Court. *Garlick* v. *Sangster*, 1832. 9 Bing. 46.

ACTION AT LAW.

On a petition presented to Lord Chancellor before 11th January 1832, to supersede, an action at law was directed to try validity of commission, costs reserved. Verdict in favour of petitioner. A new petition was thereupon presented to the Court of Review and granted:—Held, petitioner was entitled to costs of both petitions, and that C. R. had no jurisdiction in question, whether the petitioning creditor could set off the debt really due to him against those costs. *Ex parte Thomas, re Thomas*, 1832. 1 Dea. & Chit. 443.

An equitable mortgagee, who applies for a sale, will not be allowed the costs of an action at law brought for the mortgage money. *Ex parte Fletcher*, 1832. 1 Mont. 454.

Depositions taken before commissioners of bankrupt are conclusive evidence of the bankruptcy, under 6 *Geo.* 4. c. 16. s. 92. though the conversion for which the assignees proved shall have taken place after the act of bankruptcy; for the bankrupt might have sustained an action up to the time of issuing a commission; and if after that event the assignees should recover, payments to them by the defendant would be protected by s. 94, in case the commission should be afterwards superseded. *Fox* v. *Mahony*, 1831. 2 Tyrwhitt, 285. *S. C.* 2 Cromp. & J. 325.

In an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action; and if this fact be not proved the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, has not done so. *Whitworth* v. *Hall*, 1831. 2 B. & Ad. 695.

Assignees under 6 *Geo.* 4. c. 16. may maintain an action for unliquidated damages which have accrued before the bankruptcy, by non-performance of a contract. *Wright* v. *Fairfield*, 1831. 2 B. & Ad. 727.

An attorney brought an action against the petitioning creditor, under a commission of bankrupt, for business done previous to the assignment:—Held, that notwithstanding the 14th section of the bankrupt act (6 *Geo.* 4. c. 16.) he might maintain the action without proof that his charges had been allowed by the commissioners, according to the provisions of that section, as the whole was matter of investigation before the taxing officer. *Fisher* v. *Filmer*, 1831. 5 Car. & P. 92.

ADJUDICATION.

Quære, Whether adjudication need be inrolled under 6 *Geo.* 4. and 1 & 2 *Will.* 4. in order to be evidence on a trial at nisi prius, but to avoid the difficulty the Court allowed the assignees to have the proceedings in order to inrol the adjudication. *Ex parte Bowden, re Bush*, 1832. 1 Dea. & Chit. 453.

ADMINISTRATION BOND.

In a suit for inventory and account, and to make distribution, on application that an administration bond should be pronounced forfeited, on the ground of a devastavit by the administrator's appropriating the property to his own use, and that the bond might be delivered out of the registry in order to be put in suit against the sureties, the Court (a declaration instead of the inventory and account being allowed) referred to the registrar to report what residue remained to be distri-

buted, and to allot portions; and on such report (which was not objected to) assigned the administrator to pay to each distributee his respective share, and, the administrator alleging that he had become bankrupt and obtained his certificate, directed the bond to be attended with, but declined to pronounce it forfeited. *Younge* v. *Skelton*, 1831. 3 Haggard, 780.

AFFIDAVITS.

Though appearance of party is wholly unnecessary, yet if he is served with notice of an intended application to Court, he is entitled to costs; but if he makes unnecessary affidavits, he must pay costs of them. *Ex parte Read, re Mills*, 1832. 1 Dea. & Chit. 322.

Though assignees consent to abandon property under equitable mortgage, yet the Court requires an affidavit to show that such abandonment will be for the benefit of creditors. *Ex parte Wright, re Chamberlain*, 1832. 1 Dea. & Chit. 573.

Where petition informally addressed allowed to be amended, and affidavits must be resworn. *Ex parte Meath, re Pearson*, 1832. 1 Mont. 520.

AFFIDAVITS, FILING.

Where a petitioner's affidavits were only filed the day before the petition was appointed to be heard, the Court ordered it to stand over, that the respondent might answer the affidavits. *Ex parte Billings, re Lucas*, 1832. 1 Dea. & Chit. 42.

Petition part heard and adjourned, fresh affidavits cannot be filed. *Ex parte Fry, re Stinchcombe*, 1832. 1 Dea. & Chit. 488. *S. C.* 1 Mont. 519.

Affidavits filed before petition filed, bad, unless notice given of reading them; which notice must be verified. *Ex parte Palmer, re Palmer*, 1832. 1 Dea. & Chit. 490.

AFFIDAVITS, READING.

Affidavit by bankrupt in answer to petition to stay certificate and prove, filed two days before hearing, may be read, but if it makes any charge of delay against petitioner, which he is anxious to explain, Court will give him time for that purpose, more especially if the amount of his debt would turn the certificate. *Ex parte Bostock, re Wright*, 1832. 1 Dea. & Chit. 383.

Affidavit of petitioning creditor may be read in opposition to petition to supersede. *Ex parte Lowley, re Lowley*, 1832. 1 Dea. & Chit. 460. *S. C.* 1 Mont. 519.

A party using affidavits already filed, in support of a petition to the Lord Chancellor, which is transferred to this Court, must give notice to the other party. *Ex parte Donaldson, re Wright*, 1832. 1 Dea. & Chit. 36. *S. C.* 1 Mont. 520.

Where original petition is filed and affidavits put in, and then petition is amended by adding the name of another party as respondent, those affidavits cannot be read against him. *Ex parte Mascarenas, re Dawson*, 1832. 1 Dea. & Ch. 507.

AFFIDAVIT OF SERVICE.

Affidavit of service of petition ought to be in Court. *Ex parte Palmer, re Palmer*, 1832. 1 Dea. & Chit. 490.

Order in absence of parties, made on production of affidavit of service, affidavit drawn informally, but amended. Order *nunc pro tunc*, provided service was originally good. ——, *re Roberts*, 1832. 1 Dea. & Chit. 555.

AGENT.

On one petition by the assignees, ordered that the respective agents of several societies be allowed to tender proof of their respective debts before Commissioner, but not to have any power over certificate or in choice of assignees. *Ex parte Ellis, re Duckett*, 1832. 1 Dea. & Chit. 463.

The provisional assignee of a bankrupt is not responsible for the fraud of an agent appointed with due care. *Raw* v. *Cutten*, 1832. 9 Bing. 96.

ALLOWANCE.

See BANKRUPT.

AMENDMENT.

See also FIAT.

Fiat amended, no proceedings having taken place under it. *In re Graham*, 1832. 1 Dea. & Chit. 458. *See Ex parte Todd, id.* 319. *re Walker*, 381. *S. C.* 1 Mont. 510.

ANNUITY.

The General Order, 8th March 1794, does not authorize the Commissioners to order a sale of an estate on which an annuity is charged, for payment of the value of the annuity. *Re Delves*, 1831. 1 Mont. 492.

ANNULLING FIAT.

See SUPERSEDEAS.

APPEAL.

See PETITION OF APPEAL.

The Court of Review has no jurisdiction to hear a petition of appeal to the Lord Chancellor from an order of the Vice-Chancellor; nor a petition for the rehearing of a petition of appeal already heard by the Lord Chancellor; nor a cross petition of appeal to the Lord Chancellor, complaining of a particular part of the order of the Vice-Chancellor.

But it has jurisdiction to hear a petition to the Lord Chancellor for confirming the Master's report, where the Lord Chancellor had made an order on a previous petition, referring the matters therein

to the Master; or a supplemental petition of appeal to the Lord Chancellor from an order of the Vice-Chancellor, where such petition is upon new grounds, which were not brought forward by the original petition, or by the petition of appeal; or a petition to the Lord Chancellor, praying only consequential directions on one part of an order made by the Vice-Chancellor, against which no petition of appeal had been presented. *Ex parte Benson*, and *Ex parte Lancaster Canal Company, re Dilworth; Ex parte Langston, re Hardy; Ex parte Elsee, re Joyner*, 1832. 1 Dea. & Chit. 324.

ASSIGNEES,

1. *Generally, and their duties, rights, and liabilities.*
2. *Appointment and choice of.*
3. *Discharge, removal, and retiring of.*

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1. *Generally, and their duties, rights, and liabilities.*

Assignees cannot be heard on petition by individual creditor to stay certificate, though served with petition. *Ex parte Bostock, re Wright*, 1832. 1 Dea. & Chit. 383.

A surviving assignee is liable for the payment of dividends, if his co-assignee ever admitted the proof of the debt, although the creditor has failed to apply for the dividends for many years; unless it can be proved that the creditor has received them, the onus of the proof of payment lying on the assignee; and this, notwithstanding there is no sufficient fund left of the bankrupt's estate to pay the creditors. The statute of limitations does not attach to a debt proved under a commission or fiat of bankruptcy. *Ex parte Healy, re Norris*, 1832. 1 Dea. & Chit. 361.

The charge of 20*l.* per cent. imposed on assignees by 6 *Geo.* 4. c. 16. s. 104. for retaining the bankrupt's money in their hands, the bankrupt himself has no legal nor equitable claim to, either in respect of his allowance, or his rights to the surplus. *Pell*, J. dissent. *Quære.* Whether this charge is to be 20*l.* per cent. per annum, during the whole period of retention, or only one single charge of 20*l.* per cent. upon the gross sum retained. *Quære.* Whether the charge can be sustained on monies retained by assignees previous to the 1st September 1825, when the 6 *Geo.* 4. c. 16. first came into operation. *Ex parte Lowe, re Aaron*, 1832. 1 Dea. & Chit. 137. *S. C.* 1 Mont. 392.

Assignees applying to prove, are not bound by the same laches as might bind a mere individual creditor. *Ex parte Smith, re Marsh*, 1832. 1 Dea. & Chit. 267.

From the 10th to the 23d March is a reasonable time for assignees to

elect, whether they will accept or reject the bankrupt's lease. *Ex parte Fletcher, re Collins*, 1832. 1 Dea. & Chit. 356.

One of two assignees petitioned that his co-assignee, or the solicitor to the commission, (one of whom had the custody of the proceedings,) might inrol them, pursuant to 6 *Geo.* 4. c. 16. s. 96. Held, that before he petitioned for this purpose, he ought first to have applied to the co-assignee, or solicitor, to produce the proceedings at the office for inrolment. *Ex parte Evans, re Ford*, 1832. 1 Dea. & Chit. 353.

The Court will not order the bargain and sale from the Commissioners to the assignees to be given by them to a purchaser, upon his allegation merely that the bankrupt had no other freehold property than what was conveyed to the purchaser under the commission. *Ex parte Pocock, re Chapman*, 1832. 1 Dea. & Chit. 104.

Where a former memorandum of Commissioners finds that a sum of money is in the hands of one assignee, and directs it to be invested in the names of all three assignees, which however could not be done, as the money was not forthcoming; the Commissioner is not warranted in finding by a subsequent memorandum that the money is in the hands of all three assignees, and thereupon ordering them to divide it; and this Court has no jurisdiction to enter on the liability of the co-assignees to answer the consequences of trusting the assignee in default. *Ex parte Learmouth, re Thompson; Ex parte Cleaver, re Thompson*, 1832. 1 Dea. & Chit. 491.

When renewed fiat is prayed by creditor by reason of death of Commissioner, the assignee must be served with petition. *Ex parte Ray, re Wilson*, 1832. 1 Dea. & Chit. 341.

Testator by will directs his business to be carried on by his executors, and that when his son *B.* (the bankrupt) attains 21, he should, on performing certain terms, be admitted to a fourth share: *B.*, at the age of 20, enters into another business on his own account, and never claims the right under the will, or performs those conditions:—Held, nevertheless, that he had not abandoned the right, and therefore that his assignees have a right to call the executors of the will before the Commissioner and examine them as to the affairs of partnership. *Ex parte Marks, re Marks*, 1832. 1 Dea. & Chit. 499.

Though assignees consent to abandon property under equitable mortgage, yet the Court requires an affidavit to show that such abandonment will be for the benefit of creditors.

Ex parte Wright, re Chamberlain, 1832. 1 Dea. & Chit. 573.

If the assignees of a bankrupt attend meetings under a reference to which the bankrupt was a party, and make no objection to the proceedings, they will be considered as adopting them, and be bound by them. *Dod* v. *Herring.* 1830. 1 Russ. & M. 153.

A. was entitled to commission for introducing to a tradesman a purchaser for his business, which was to be paid on the completion of the bargain. After he had introduced the purchaser, but before the matter was settled, he became bankrupt, and his assignees brought an action for the commission, which they afterwards discontinued, and wrote to him, saying that they disclaimed all right to the money. *A.* upon this brought an action in his own name :—Held, that he was not entitled to recover. *Hillary* v. *Morris,* 1831. 5 Car. & P. 6.

Defendant, a leaseholder, underlet to *N.* and put him in possession under an agreement to grant a lease when *N.* should have paid 1200*l.*, which he was to do by instalments in 3 years, in the mean time paying rent at certain days to defendant, subject to distress for non-payment. Defendant received rent from *N.*, but omitted to pay the superior landlord, who distrained on *N.* for arrears due from defendant. *N.* having become bankrupt: —Held, that the damage incurred by this distress was a cause of action on which his assignees might sue. *Hancock* v. *Caffyn,* 1832. 8 Bingh. 358.

H., before his bankruptcy, hired a carriage of *M.*, and let it to defendant; defendant sent it back to *H.* damaged; *M.* repaired it with the assent of *H.*, and *H.* having become bankrupt, proved the amount due for repairs under *H.*'s commission :—Held, that *H.*'s assignees had a right of action against the defendant, although *H.*'s estate paid no dividend. *Porter* v. *Vorley,* 1832. 9 Bingh. 93.

Assignees under 6 *Geo.* 4. c. 16. may maintain an action for unliquidated damages which have accrued before the bankruptcy by non-performance of a contract. *Wright* v. *Fairfield,* 1831. 2 B. & Ad. 727.

The 45th sec. of the statute 6 *Geo.* 4. c. 16. imposes a penalty on the provisional assignee, if he does not deliver up the bankrupt's estate to the ultimate assignee. The 67th section enacts, that the suit is not to abate by the death of an assignee, but that it may be prosecuted in the name of the new assignee; and by the 100th section, the sum recovered for a penalty under the act is to be divided among the creditors. An assignee having died, and a suggestion of

his death entered upon the record:—Held, that the succeeding assignee was entitled to proceed in a suit which had been commenced by his predecessor against the provisional assignee for a penalty:—Held, also, that as the assignment to the provisional assignee was recited in the assignment to the second assignee, it was not incumbent on the plaintiff to produce it in evidence. *Bates* v. *Sturges*, 1831. 5 Moore & P. 568.

2. *Assignees, appointment and choice of.*

Creditors having, subsequent to the appointment, signed resolutions authorizing the assignees to do certain acts, as assignees, which they could not have performed without such authority, and to act generally as assignees, are debarred from questioning the validity of the appointment at a subsequent period, upon grounds of which they were aware at the time of signature.

Semble, also, that the appointment is not complete till the declaration of appointment is signed by the Commissioner. *Ex parte Nash, re Wyatt*, 1832. 1 Dea. & Chit. 445.

The 1 & 2 *Will.* 4. c. 56. s. 27. does not require the certificate of the appointment of assignees to be registered, in order to protect them against subsequent purchasers of the bankrupt's freehold property without notice, unless the property is situate in a register county. *Anon.* 1832. 1 Dea. & Chit. 349.

Where there is only one assignee surviving, and he, from his advanced age (72), is desirous of being removed from the office, the proper course is to procure a new choice in the room of those who are dead, and then to apply that he may be removed. *Ex parte Rapp, re Smith*, 1832. 1 Dea. & Chit. 461.

On application to remove one of several assignees the proper course is to petition for a new choice. *Ex parte Steel, re Steel*, 1832. 1 Dea. & Chit. 488.

Semble, that a creditor who has proved, is entitled to vote in the choice of assignees, if he apply before the Commissioner has signed the declaration of appointment, although the Commissioner had previously verbally declared the choice complete. *Ex parte Nash, re Wyatt*, 1832. 1 Dea. & Chit. 445.

Quære, Whether a creditor on a voluntary bond is entitled to vote in the choice of assignees? *Ex parte Venables*, 1831. 1 Mont. 494.

3. *Assignee, discharge, removal, and retiring of.*

Semble, that where one assignee had obtained an order to discharge himself from the office (which was not drawn up), but the Commissioners had, by their memorandums, virtually recognized such discharge by excluding his name from them, he cannot be made liable by any subsequent memorandums. *Ex parte Learmouth, re Thompson; Ex*

parte Cleaver, re Thompson, 1832. 1 Dea. & Chit. 491.

Where an assignee, on being chosen, accepts the office, he can only retire on payment of the costs occasioned by his removal. *Ex parte Watts, re Henfrey*, 1832. 1 Dea. & Chit. 322.

Where an assignee is removed, and another appointed, there is no need of any assigment under the 1 & 2 *Will.* 4. c. 56. *Ex parte Falar, re Andrews*, 1832. 1 Dea. & Chit. 32.

Where an assignee is removed for the benefit of the estate, he is entitled to be reimbursed out of any fund in hand, before it is transferred to the new assignee. *Ex parte James, re Davis*, 1832. 1 Dea. & Chit. 272.

Where there is only one assignee surviving, and he, from his advanced age (72), is desirous of being removed from the office, the proper course is to procure a new choice in the room of those who are dead, and then to apply that he may be removed. *Ex parte Rapp, re Smith*, 1832. 1 Dea. & Chit. 461.

On application to remove one of several assignees, the proper course is to petition for a new choice. *Ex parte Steel, re Steel*, 1832. 1 Dea. & Chit. 488.

ASSIGNEE, OFFICIAL.

See also Official Assignee.

Where the provisional assignee is directed to carry on the business of the bankrupt for the benefit of the creditors, the official assignee will be ordered to supply him with funds for that purpose. *Ex parte Wyatt*, 1832. 1 Dea. & Chit. 229.

By 1 & 2 *Will.* 4. c. 56. s. 36. the Court has power to remove an official assignee, as well as any other assignee.

By section 40, the Commissioner has a discretion to appoint, or not to appoint, an official assignee, where a commission issued before that act began to operate. But where the Commissioner appointed one, thinking he had no discretion, the Court will not on this ground alone remove the official assignee. *Ex parte Ellis, re Houghton and Watts*, 1832. 1 Dea. & Chit. 209.

ASSIGNEE, PROVISIONAL.

Where the provisional assignee is directed to carry on the business of the bankrupt for the benefit of the creditors, the official assignee will be ordered to supply him with funds for that purpose. *Ex parte Wyatt*, 1832. 1 Dea. & Chit. 229.

The 45th sec. of the statute 6 *Geo.* 4. c. 16. imposes a penalty on the provisional assignee, if he does not deliver up the bankrupt's estate to the ultimate assignee. The 67th section enacts, that the suit is not to abate by the death of an assignee, but that it may be prosecuted in the name of the new assignee; and by the 100th sec. the sum re-

covered for a penalty under the act is to be divided among the creditors. An assignee having died, and a suggestion of his death entered upon the record:—Held, that the succeeding assignee was entitled to proceed in a suit which had been commenced by his predecessor against the provisional assignee for a penalty:—Held, also, that as the assignment to the provisional assignee was recited in the assignment to the second assignee, it was not incumbent on the plaintiff to produce it in evidence. *Bates* v. *Sturges*, 1831. 5 Moore & P. 568.

ASSIGNMENT, DEED OF.

Where an assignee is removed, and another appointed, there is no need of any assignment under the 1 & 2 *Will.* 4. c. 56. *Ex parte Falar, re Andrews*, 1832. 1 Dea. & Chit. 32.

ASSIGNMENT AND TRANSFER.

A letter to the secretary of an insurance office, in which the writer says, "I am holder of the undermentioned policies," and inquires what the office would give for them, is sufficient notice of an assignment. *Ex parte Stright, re Eyles*, 1832. 1 Mont. 502.

ASSIGNMENT, WHAT PASSES.

A solvent partner is entitled to retain the partnership books, when the other becomes bankrupt. *Ex parte Finch, re Coverdale*, 1832. 1 Dea. & Chit. 274.

Where a company is formed by act of parliament for the purchase of lands to make a canal, and the act declares that the shares "shall be deemed personal estate, and shall be transmissible as such:"—Held, that though the profits arose out of the land, the shares were personal property, passing as such to the assignees on the bankruptcy of a proprietor.

Where an act prescribes certain forms in the transfer of such shares: Held, unless they are strictly complied with, the shares remain in the order and disposition of the bankrupt proprietor, the ordinary mode of transfer not constituting an equitable mortgage. And though the act only expressly relates to transfers between third parties, yet it impliedly relates to where the company are the transferees. *Ex parte Lancaster Canal Company, re Dilworth*, 1832. 1 Dea. & Chit. 411.

A. was in the habit of indorsing and paying into his country banker, *B.*'s hands, bills not due, which were entered by *B.* in the pass-book as bills to his credit to the full amount. By the custom of the bank the customers were at liberty to draw for the amount of such bills immediately, and the bank was at liberty to pay away such bills as they thought fit. There was no evidence of *A.*'s knowledge of this custom, and *A.* swore that he never gave authority to *B.* to negotiate them, but deposited them

only that *B.* might receive the value when at maturity; that he never drew on account of any bill till after it was due; that the balance of accounts, independent of the bills, was always in his favour; and that he never received more than one such bill (deposited by another customer) in answer to his cheques. *B.* having negotiated them to *C.* as a security for a debt, and *B.* becoming bankrupt before the bills were due:—Held, that they did not pass to *B.*'s assignees, and therefore *A.* was entitled to be indemnified from the surplus security in the hands of *C.* *Ex parte Benson, re Dilworth*, 1832. 1 Dea. & Chit. 435.

A lease of lands contained a condition, "that if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fieri facias*, or any other writ of execution should issue," it should be lawful for the lessor to re-enter into the demised premises; and the same again to have, repossess, and enjoy, as in his former estate. The tenant gave a warrant of attorney, upon which judgment was entered up, and his goods taken in execution and sold, and a commission of bankrupt afterwards issued against him. The lessor entered for the forfeiture:—Held, that he was entitled to the emblements. *Davis* v. *Eyton*, 1830. 4 Moore & P. 820.

A testator bequeathed the dividends of certain stocks to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few week's prior to a codicil confirming it, the nephew took the benefit of the Lords' Act, (1 Geo. IV. c. 119.) in the usual way, and some years afterwards the testator died:—Held, that this insolvency operated as a forfeiture of the life-interest given to the nephew by the will, *Yarnold* v. *Moorhouse*, 1830. 1 Russ. & M. 364.

The sheriff sold goods under a *fieri facias* after a secret act of bankruptcy committed by the debtor, and, after notice of the act of bankruptcy, paid over the proceeds to the execution creditor, under an indem-

nity :—Held, that the assignee might recover the amount from the sheriff in an action for money had and received. *Young* v. *Marshall & Poland*, 1831. 6 Moore & P. 110. *S. C.* 8 Bing. 43.

Where stock was given upon trust for *A.* for life, and after his decease for his children, with a proviso that *A.*'s life-interest should not be subject to any alienation or disposition, by sale, mortgage, or otherwise, in any manner whatsover ; and in case he should charge or affect to charge, affect, or incumber the same, such mortgage, sale, or other disposition, so made by him, should operate as a complete forfeiture thereof, and the same should devolve upon the persons next entitled :—Held, that on *A.*'s bankruptcy, his life-interest passed to his assignees to the exclusion of his children. *Lear* v. *Leggett*, 1830. 1 Russ. & M. 690.

A lessee of a mill and steam-engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the height and extent of the mill, and removed all the works of the engine, except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power. Injunction granted to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building, and the new parts of the engine, subject to an action to be brought by the lessors to try the right. *Sunderland* v. *Newton*, 1830. 3 Sim. 450.

Goods were seized and sold under a *fi. fa.* by a chief bailiff of a franchise, having sole execution of writs therein, after an act of bankruptcy committed by the defendant, but without knowledge thereof, and before the commission issued : —Held that trover would not lie by the assignees against the chief bailiff, though the property in the goods vested in them by relation to the act of bankruptcy. *Secus* as to the deputy bailiff, who had taken indemnity from the judgment creditors. *Balm* v. *Hutton*, 1831. 2 Tyrwhitt, 17. *S. C.* 2 Cromp. & J. 19.

ATTACHMENT.

Whatever ground there may be for the discharge of a party who is arrested on an attachment for not paying costs pursuant to an order, previous notice of the application must be given to the other side. *Ex parte White, re Scrivenor*, 1832. 1 Dea. & Chit. 39. *S. C.* 1 Mont. 517.

ATTESTATION.

See Petition, *Form*, &c.

ATTORNEY.

See Solicitor.

A BANKRUPT'S ALLOWANCE.

Taking allowance under commission does not preclude an application by bankrupt to supersede. *Ex parte Giles, re Giles,* 1832. 1 Dea. & Chit. 548.

A. B. and *C.* are bankrupts. Their joint estate pays 9*s.* in the pound; the separate assets of *A.* and *B.* contribute sufficient to make a dividend of 15*s.* in the pound, but *C.*'s separate estate contributes nothing: Held, nevertheless, he was entitled to allowance under 6 *Geo.* 4. c. 16. ss. 128, 129. *Ex parte Morris, re Morris,* 1832. 1 Dea. & Chit. 526. *S. C.* 1 Mont. 505.

BANKRUPT CONCEALING EFFECTS.

A bankrupt is not indictable on the statute 6 *Geo.* 4. c. 16. s. 112, for concealing his books till after he has concluded his last examination. *Rex* v. *Walters,* 1831. 5 Car. & P. 138.

BANKRUPT'S EXAMINATION.

Where the bankrupt, after attending the last meeting before the Commissioners, inadvertently absented himself without passing his last examination, the Court, on his petition, ordered a fresh meeting for that purpose. *Ex parte Dixon, re Dixon,* 1832. 1 Dea. & Chit. 351.

Parol evidence of any thing that a bankrupt says at the time of his last examination, cannot be received, although it should appear that no part of what he said was taken down in writing. *Rex* v. *Warlters,* 1831. 5 Car. & P. 138.

BANKRUPT.

Power, Duties, and Liabilities.

The Court of Review has power to examine the bankrupt *vivâ voce* on his petition to supersede the commission. *Ex parte Palmer, re Palmer,* 1832. 1 Dea. & Chit. 375. *Sed vide Sayer & Garnett,* 4 Moore & P. 734.

The bankrupt, during the forty days allowed for his examination, is, for the benefit of his creditors, privileged from arrest, even upon a *capias utlagatum. Ex parte Helsby, re Helsby,* 1832. 1 Dea. & Chit. 16. *S. C.* 1 Mont. 355.

A. was entitled to commission for introducing to a tradesman a purchaser for his business, which was to be paid on the completion of the bargain. After he had introduced the purchaser, but before the matter was settled, he became bankrupt, and his assignees brought an action for the commission, which they afterwards discontinued, and wrote to him, saying that they disclaimed all right to the money. *A.* upon this brought an action in his own name:—Held, that he was not entitled to recover. *Hillary* v. *Morris,* 1831. 5 Car. & P. 6.

A bankrupt cannot be called as a witness either to support or to defeat the commission, or even to explain

a doubtful act, which might or might not be an act of bankruptcy. *Sayer* v. *Garnett*, 1830. 4 Moore & P. 734. *Sed Vide Ex parte Palmer*, 1 Dea. & Chit. 375.

BANKRUPT'S SURRENDER.

When bankrupt abroad, the time for his surrender will be enlarged. *Ex parte Dodds, re Dodds*, 1832. 1 Dea. & Chit. 76. *S. C.* 1 Mont. 506.

An order to enlarge the time for the bankrupt's surrender is of course, if applied for six clear days before the day appointed for his surrender. *Ex parte Rose, re Rose*, 1832. 1 Dea. & Chit. 37.

BANKRUPTCY, EFFECT OF.

In a marriage settlement, where part of the trust fund consists of the wife's fortune, a limitation to the husband until bankruptcy, and upon that event for the benefit of the wife and children, is valid to the extent of the wife's proportion of the fund. *Lester* v. *Garland*, 1832. 1 Mont. 471.

A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the Lords' Act (1 *Geo.* 4. c. 119,) in the usual way; and some years afterwards the testator died: —Held, that this insolvency operated as a forfeiture of the life interest given to the nephew by the will. *Yarnold* v. *Moorhouse*, 1830. 1 Russ. & M. 364.

BARGAIN AND SALE.

The Court will not order the bargain and sale from the Commissioners to the assignees to be given by them to a purchaser, upon his allegation merely, that the bankrupt had no other freehold property than what was conveyed to the purchaser under the commission. *Ex parte Pocock, re Chapman*, 1832. 1 Dea. & Chit. 104.

BARRISTER.

If the barristers in a country commission are absent, an order may be obtained for the others to hold the third meeting. *Ex parte James, re Hughes*, 1832. 1 Mont. 454.

CANAL SHARES.

Where a company is formed by act of parliament for the purchase of lands to make a canal, and the act declares that the shares "shall be deemed personal estate and shall be transmissible as such:" — Held, that though the profits arose out of the land, the shares were personal property, passing as such to the assignees on the bankruptcy of a proprietor.

Where an act prescribes certain forms in the transfer of such shares:— Held, unless they are strictly complied with, the shares remain in the order and disposition of the bankrupt proprietor, the ordinary mode of transfer not constituting an equitable mortgage. And though the act only expressly relates to transfers between third parties, yet it impliedly relates to where the company are the transferees. *Ex parte Lancaster Canal Company, re Dilworth*, 1832. 1 Dea. & Chit. 411.

CERTIFICATE OF COMMISSIONERS.

Unless certificate of Commissioner be filed, Court cannot order a copy of it to be delivered. *Ex parte Shore, re Lucas*, 1832. 1 Dea. & Chit. 531.

CERTIFICATE OF BANKRUPTCY.

See also ORDER TO STAY.—PETITION TO STAY.

In 1806 *P.* proves a debt against the estate of *B.* & Co. bankrupts, on a bill of exchange, and dies in 1807, appointing *G.* his executor; *G.* becomes bankrupt in 1816, and obtains his certificate in 1817: but before that time, viz. in the years 1811, 1814, 1815, *G.* had, as executor, received three dividends on *P.*'s debt, and in 1817, 1822, and 1828 he receives three other dividends. It afterwards turns out, that the bill of exchange was paid by another party in 1807, so that no dividend was ever due.

On petition by *B.* & Co.'s assignees to expunge the proof, and that *G.* should refund the six dividends:— Held, first, that it being in the nature of a trust, the statute of limitations did not run in favour of *G.* But second, that as the first three dividends were paid in error, and were a legal debt against *G.* and might have been proved under his bankruptcy, the claim as to them was barred by *G.*'s certificate. The other three received since his bankruptcy were ordered to be refunded. *Ex parte Bolton, re Baillie*, 1832. 1 Dea. & Chit. 556.

Form of petition to prove and stay certificate. *Ex parte Skipp, re Singleton*, 1832. 1 Dea. & Chit. 497.

It is no objection to the granting the certificate, that the date of the signatures was attached by a third person, if it be so done before the creditor signs his name.

General orders may be dispensed

with, under circumstances, in discretion of Court. *Ex parte Reynolds, re Reynolds,* 1832. 1 Dea. & Chit. 459. *S. C.* 1 Mont. 508.

Where a creditor does not use due diligence to prove his debt, he is not entitled to petition to stay the bankrupt's certificate, in order to afford him time to do so, with a view of dissenting from its allowance.

An affidavit by the bankrupt in answer to such a petition, filed two days before the hearing, may be read; but if it makes any charge of delay against the petitioner, which he is anxious to explain, the Court will give him time for that purpose, more especially if the amount of his debt would turn the certificate.

A petition to stay the certificate and expunge a creditor's name from it, who had signed it, on the ground that he had been previously satisfied his debt, must be served on the creditor.

A creditor, by petitioning to stay the certificate, makes his election to come in under the commission for every proveable debt which may be owing to him from the bankrupt; and, therefore, the bankrupt must be discharged from any action pending against him by the creditor in respect of any such debt, before the petition can be proceeded in.

The assignees cannot be heard on a petition by an individual creditor to stay the bankrupt's certificate, although they may have been served with the petition. *Ex parte Bostock, re Wright,* 1832. 1 Dea. & Chit. 383.

Commissioner directed to sign certificate, although the year was omitted to one of the signatures, when it was preceded and followed by dates subsequent to that of the last examination. *Ex parte Shoults, re Venson,* 1832. 1 Dea. & Chit. 531.

A. guaranteed the payment of goods to be supplied by *B.* to *C.* *C.* became bankrupt, and *B.* proved under his commission, and afterwards signed his certificate. *A.* gave him notice not to do so:—Held, that, nevertheless, *A.* was not discharged from his liability as surety, as it was his duty to have paid the debt due from *C.* to *B.*; but as he neglected to do so, and permitted *B.* to prove under *C.*'s commission, *B.*'s signing the certificate was not such an act as to alter *A.*'s right without his control or consent, as he might have paid the debt in due time, and thereby prevented *B.* from proving under the commission. *Brown* v. *Carr, Dodgson, and Bell,* 1831. 5 Moore & P. 497.

An accountant who has been employed in a bankruptcy, has no lien on the bankrupt's certificate for the payment of his costs. *Anon.* 1831. 1 Russ. & M. 330.

Where bankrupt's certificate stayed to give a creditor time to prove,

and that creditor is paid, certificate will be allowed, notwithstanding the order to stay. *Re Hall,* 1832. 1 Mont. 508.

COLLUSION.

When petition is presented to stay certificate, and petitioner then withdraws his opposition, an affidavit of no collusion is requisite. *Ex parte Cates, re Jackson,* 1832. 1 Dea. & Chit. 546.

COMMISSION, CONSOLIDATING.

See also FIAT.

Where a commission (issued before the new act) had been transferred to one commissioner, and a fiat against the same bankrupt by a different name had been directed to another, the Court ordered the commission to be transferred to the Commissioner to whom the fiat was directed. *Re Knox,* 1832. 1 Dea. & Chit. 317.

COMMISSION, IMPOUNDING.

See also FIAT.

Where all the creditors lived in London, except two, a London fiat was directed, instead of the country commission already issued; which last was ordered to be impounded. *Ex parte Johnson,* 1832. 1 Dea. & Chit. 221.

COMMISSION, OPENING.

See also FIAT—OPENING COMMISSION—PETITIONING CREDITOR.

Personal attendance of petitioning creditor at opening of commission 200 miles off dispensed with, on ground of personal inconvenience. *Ex parte Ross, re Kirby,* 1832. 1 Dea. & Chit. 552.

Time of opening a fiat enlarged, where witness in support of the bankruptcy keeps out of the way and is summoned by the Commissioner to attend on a future day. *Ex parte Fox, re Bennett,* 1832. 1 Dea. & Chit. 572.

COMMISSIONERS.

The commissioners have no power under the 33d & 34th sections of the 6 *Geo.* 4. to examine the executors of a debtor to the bankrupt as to the amount of the assets that have come to the hands of such executor. *Ex parte Solarte, re Alzedo,* 1832. 1 Dea. & Chit. 311. *S. C.* 1 Mont. 495.

The General Order 8 March 1794, does not authorize the commissioners to order a sale of an estate on which an annuity is charged for payment of the value of the annuity. *Re Delves,* 1831. 1 Mont. 492.

The examination of a third person by commissioners is not evidence for the formation of their judgment, but merely a brief to enable them to interrogate the witness. *Re John Goodwin,* 1832. 1 Mont. 304.

The solicitor for a judgment creditor should not act as a commissioner.

Ex parte Shum, re Rose, 1832. 1 Mont. 454.

If the barristers in a country commission are absent, an order may be obtained for the others to hold a third meeting. *Ex parte James, re Hughes,* 1832. 1 Mont. 454.

COMMITMENT.

Court cannot proceed towards commitment of party for non-payment of costs on the usual seven days' order of Vice-Chancellor. *Ex parte Ferris,* 1832. 1 Dea. & Chit. 498. *S. C.* 1 Mont. 513.

The examination of a third person by commissioners is not evidence for the formation of their judgment, but merely a brief to enable them to interrogate the witness. *Re John Goodwin,* 1832. 1 Mont. 304.

COMPENSATION.

Although all the creditors, save one, and the bankrupt and assignees consent, the Court cannot direct that the official assignee be at liberty to award a party a remuneration for trouble incurred touching the bankrupt's estate, between time of stopping payment and issuing the fiat. Nor can it direct the commissioner to ascertain if proper. *Ex parte Burles, re May,* 1832. 1 Dea. & Chit. 543.

COMPOSITION.

Order for supersedeas under the composition contract. *Ex parte Osborne,* 1832. 1 Dea. & Chit. 37.

When the time has expired for opening a fiat, the Court will not grant further time for this purpose to the petitioning creditor, merely because he has been negotiating for a composition with the general body of the creditors. *Ex parte Dowton, re Wisden,* 1832. 1 Dea. & Chit. 111.

CONSOLIDATION OF COMMISSION.

Where commission (issued before new act) had been transferred to one commissioner, and a fiat against the same bankrupt by a different name had been directed to another, the Court ordered the commission to be transferred to the commissioner to whom the fiat was directed. *Re Knox,* 1832. 1 Dea. & Chit. 317.

CONSENT.

Service of petition to supersede by consent. *Re Eastcourt,* 1832. 1 Dea. & Chit. 458.

CONTEMPT.

Where petition is ordered to stand over, and costs of day to be paid by petitioner, it is not usual to draw up the order; therefore the non-payment of these costs is not such an objection as prevents the petitioner from being heard on a future day. *Ex parte Clarke, re Sewercrop,* 1832.

1 Dea. & Chit. 525. *S.C.* 1 Mont. 503.

CONTINGENT DEBTS.

A bankrupt covenanted by his marriage settlement, that his heirs, executors, &c. should, within twelve calendar months after his decease, pay 4,000*l.* to trustees, upon trust to pay the interest to his intended wife for her life; and after her death, then to pay the principal sum to the children of the marriage; and if no children, to the wife if she survived her husband; but if not, then to the executors of the husband:—Held, that this covenant constituted a debt contracted by the bankrupt, payable on a contingency, and capable of valuation; and therefore provable within the 56th section of the 6 *Geo.* 4. c. 16. *Ex parte Tindal, re Gibbins*, 1832. 1 Dea. & Chit. 291. *S. C.* 1 Mont. 375, 462. 8 Bing. 402.

COPIES.

Unless certificate of commissioner be filed, the Court cannot order a copy of it to be delivered. *Ex parte Shore, re Lucas*, 1832. 1 Dea. & Chit. 531.

COSTS.

See also TAXATION.

A. employs *B.*, a solicitor, to strike a docket against *C.*, which is done, but afterwards is abandoned. Subsequently *A.* employed *D.* to strike a docket, which is regularly followed up:—Held, that *A.* is not entitled to have *B.*'s costs taxed under the commission. *Ex parte Neal, re Bartlett*, 1832. 1 Dea. & Chit. 486.

An order made for taxation, and one-sixth taxed off. Solicitor applying to confirm, and giving notice to petitioner, must pay costs of petitioner's appearance on such application, and also costs of petition and of taxation. *Ex parte Nutting, re Shepherd*, 1832. 1 Dea. & Chit. 551.

A bankrupt having employed *A.*, a solicitor, to procure signatures of creditors to his certificate, and then ceased to employ him, cannot oblige his, *A.*'s, clerk to make affidavit of witnessing the signatures without first paying *A.* his costs for such business. *Ex parte Shore, re Lucas*, 1832. 1 Dea. & Chit. 509.

Costs of application of mortgagee to bid at the sale ordered to be paid out of the proceeds. *Ex parte Say, re Thornton*, 1832. 1 Dea. & Chit. 32. *S.C.* 1 Mont. 364. *Sed vide Ex parte Williams*, 1 Dea. & Chit. 489. *S. C.* 1 Mont. 514.

Mortgagees costs to be paid out of the proceeds of the sale. *Ex parte Browne, re Clark*, 1832. 1 Dea. & Chit. 34. *Sed vide Ex parte Williams, id.* 489.

Mortgagee applying for leave to bid must always pay costs of petition, unless consent otherwise. *Ex parte Williams, re Hall,* 1832. 1 Dea. & Chit. 489. *S. C.* 1 Mont. 514.

An equitable mortgagee of one partner, for a debt due from the other, may prove his whole debt against the separate estate of that other partner, and retain his security against the first.

Where a petition to prove is unnecessary, the petitioner is liable to costs. *Ex parte Rogers, re Parkin,* 1832. 1 Dea. & Chit. 38.

The clerk of a creditor, claiming as equitable mortgagee, drew up and signed the memorandum accompanying the deposit of a lease by the bankrupt; but it was not signed by the bankrupt himself, nor was it alleged that the clerk was authorized by the bankrupt to draw up such memorandum, or that it was ever shown to the bankrupt:—Held, under these circumstances, that the equitable mortgagee was not entitled to the costs of the sale. *Ex parte Reid, re Mills,* 1832. 1 Dea. & Chit. 250.

Where an assignee is removed for the benefit of the estate, he is entitled to be reimbursed out of any fund in hand, before it is transferred to the new assignee. *Ex parte James, re Davis,* 1832. 1 Dea. & Chit. 272.

A bankrupt cannot petition to supersede a commission on the ground of the insufficiency of the petitioning creditors' debt, when he has lain by two years without adopting any proceeding for that purpose. A petition is not necessarily dismissed with costs, because a previous petition for the same object has been also dismissed, if the dismissal of the prior petition was on a mere matter of form. *Ex parte Hooper, re Hooper,* 1832. 1 Dea. & Chit. 117.

Where deeds relating to freehold and leasehold property were deposited with an equitable mortgagee, but the memorandums accompanying the deposit merely related to the leasehold property:—Held, that the mortgagee might nevertheless pray a sale of the freehold as well as the leasehold property, subject, however, to the payment of the costs of the sale. *Ex parte Robinson, re Evans,* 1832. 1 Dea. & Chit. 119.

Petition for keeping separate accounts, which might be done under the general order, dismissed with costs. *Ex parte Green, re Holder,* 1832. 1 Dea. & Chit. 382.

On petition presented to L. C. before 11th Jan. 1832, to supersede, an action at law was directed to try validity of commission, costs reserved. Verdict in favour of petitioner. A new petition was thereupon presented to C. R. and granted:—Held, petitioner was entitled to costs of both petitions, and that C. R. had no jurisdiction

in question, whether the petitioning creditor could set off the debt really due to him against those costs. *Ex parte Thomas, re Thomas,* 1832. 1 Dea. & Chit. 443.

Where petition is ordered to stand over, and costs of the day to be paid by petitioner, it is not usual to draw up the order: therefore non-payment of those costs is not such an objection as prevents the petitioner from being heard on the future day. *Ex parte Clarke, re Sewercrop,* 1832. 1 Dea. & Chit. 525. *S. C.* 1 Mont. 503.

Though the appearance of a party is wholly unnecessary, yet if he is served with notice of an intended application to the Court, he is entitled to his costs of appearance; but if he makes affidavits which are unnecessary, he must pay the costs occasioned thereby. *Ex parte Reid, re Mills,* 1832. 1 Dea. & Chit. 322.

Where assignee, on being chosen, accepts the office, he can only retire on payment of costs of his removal. *Ex parte Watts, re Henfrey,* 1832. 1 Dea. & Chit. 322.

An equitable mortgagee, who applies for a sale, will not be allowed the costs of an action at law brought for the mortgage money. *Ex parte Fletcher,* 1832. 1 Mont. 454.

A bill of costs for business done under a commission of bankruptcy need not be delivered, signed by the attorney, a month before action brought thereon. *Hamilton* v. *Jones,* 1830. 4 Moore & P. 869.

An attorney brought an action against the petitioning creditor, under a commission of bankrupt, for business done previous to the assignment:—Held, that notwithstanding the 14th section of the Bankrupt Act, 6 *Geo.* 4. c. 16. he might maintain the action without proof that his charges had been allowed by the commissioners, according to the provisions of that section, as the whole was matter of investigation before the taxing officer. *Fisher* v. *Filmer,* 1831. 5 Car. & P. 92.

After a commission of bankruptcy was sued out against the plaintiff, the defendant signed judgment as in case of a nonsuit, taxed the costs, and sued out execution. The first day of the term, to which the judgment related, was before the commission was issued:—Held, that the costs were not proveable under the commission, as they did not constitute a debt till judgment was actually signed; and that although the plaintiff had obtained his certificate, he was still liable for such costs. *Brough* v. *Adcock,* 1831. 5 Moore & P. 678.

COUNTRY COMMISSION.

Bankrupt has houses of business at L. & M., majority of creditors living at M. Order necessary to obtain country commission at M. *Ex*

parte Wood, re Swainson, 1832. 1 Dea. & Chit. 410.

COVENANT.

By indenture of demise, reciting that the lessee had purchased certain fixtures on the premises, on condition of their being repurchased as after-mentioned, it was agreed between the lessor and lessee, and the lessor covenanted, that on the expiration or other sooner determination of the term, he, the lessor, should and would take the fixtures at such price as they should be appraised at by two competent persons, one to be named on each side.

The lessee became bankrupt, and his assignee declined the lease (which was delivered up), but he required the fixtures to be re-purchased, and brought an action of covenant against the lessor for not appointing an appraiser: — Held, that as by 6 *Geo.* 4. c. 16. s. 75. the bankrupt, on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant in question could not be enforced by the assignee against the lessor. *Kearsay* v. *Carstairs*, 1831. 2 B. & Ad. 716.

DAMAGES.

Assignees under 6 *Geo.* 4. c. 16. may maintain an action for unliquidated damages which have accrued before the bankruptcy by non-performance of a contract. *Wright* v. *Fairfield*, 1831. 2 B. & Ad. 727.

W. and *T.* arrested *M.* and *S.* for debt, and shortly afterwards issued a commission of bankruptcy against them, but, after proving their debt, abandoned the commission, in order to proceed against the bail in the action. They then obtained the joint note of *H.* (one of the bail) and of *M.* and *S.*, and compelled *H.* to pay the note; soon after which a second commission issued against *S.* as surviving partner of *M.* After giving this note, the bail took an assignment from *M.* and *S.* of all their stock in trade, &c. as an indemnity against the consequences of becoming bail:—Held, that none of these circumstances operated as a forfeiture of the debt of *W.* and *T.* within the meaning of the 8th section of 6 *Geo.* 4. c. 16:—Held, also, that *M.* having died before adjudication under the first commission, that commission became null and void, without any writ of supersedeas. Quære, whether, in case of such a forfeiture of the debt by the petitioning creditor, this Court can order him to pay over the amount to the assignees. *Ex parte Green, re Madders*, 1832. 1 Dea. & Chit. 230.

DEBTS PROVEABLE.

A defendant compromised an action for libel, by agreeing to apologise, and pay the plaintiff's costs. The

apology was made, and a rule of Court obtained, ordering the defendant to pay the costs, amounting to 67*l.* On default made, an attachment issued, and the defendant was committed. While in custody he became bankrupt, and obtained his certificate :—Held, that the sum named in the rule of Court was a debt which might have been proved under the commission, and that the defendant was entitled to be discharged out of custody. *Riley* v. *Byrne*, 1831. 2 B. & Ad. 779.

After a commission of bankruptcy was sued out against the plaintiff, the defendant signed judgment as in case of a nonsuit, taxed the costs, and sued out execution. The first day of the term, to which the judgment related, was before the commission was issued :—Held, that the costs were not proveable under the commission, as they did not constitute a debt till judgment was actually signed; and that although the plaintiff had obtained his certificate, he was still liable for such costs. *Brough* v. *Adcock*, 1831. 5 Moore & P. 678.

DECISIONS OVERRULED.

Ex parte Billiards, Buck, 220; *Ex parte Edwards*, id. 232; and *Ex parte Marks*, 1 G. & J. 70, overruled. *Ex parte Thomas, re Thomas*, 1832, 1 Dea. & Chit. 443.

Coldwell v. *Gregory*, 1 Pri. 129, overruled by *Enderby* v. *Gilpin*, 2 B. & C. 389. *Ex parte Chuck*, 1 Mont. 365.

DEEDS, REGISTRATION.

The want of registration of a conveyance invalidates the deed as to subsequent purchasers only, not as to assignees of the party conveying property. *Ex parte Coles, re Rucker*, 1832. 1 Dea. & Chit. 100.

DEEDS, INSPECTION OF.

In 1811 *A.* and *B.* entered into a partnership, which continued till 1818, when it was dissolved, and the affairs wound up, except as to some outstanding debts. In 1820 a deed of release was executed, from which these debts were excluded. Partnership books relating generally to these and other debts were all along suffered to remain in the hands of *A.* All the outstanding debts were subsequently settled. In 1830 *B.* was declared bankrupt, till which time the books were never called for by *B.* :—Held, that *A.* and *B.* nevertheless continued tenants in common in respect of them, and that the length of time did not affect that relationship, and, therefore, although there was no charge of fraud in the settled account, yet the Commissioner had jurisdiction to call *A.* before him, and examine him and the books, relative to the former dealings of the bankrupt. *Ex parte Trueman, re Martindale*, 1832. 1 Dea. & Chit. 464.

DELIVERY UP OF CHATTELS.

Order made on assignees, though they did not distinctly repudiate the right of property, for delivery of chattels belonging to third party in hands of bankrupt. *Ex parte Eden, re Jackson*, 1832. 1 Mont. 506.

DEPOSITIONS.

Depositions taken before Commissioners of bankrupt are conclusive evidence of the bankruptcy under 6 *Geo.* 4. c. 16. s. 92. though the conversion for which the assignees proved shall have taken place after the act of bankruptcy; for the bankrupt might have sustained an action up to the time of issuing a commission; and if after that event the assignees should recover, payments to them by the defendant would be protected by sect. 94, in case the commission should be afterwards superseded. *Fox* v. *Mahoney*, 1831. 2 Tyrwhitt, 285. *S.C.* 2 Cromp. & J. 325.

DIVIDEND.

An official assignee having sent to the petitioner (who was employed under the commission to sell part of the bankrupt's property) the usual circular, that a dividend was due on his debt, cannot afterwards refuse to pay the same, upon the plea that his accounts for such business done by him are erroneous. *Ex parte Alexander, re Elder*, 1832. 1 Dea. & Chit. 513. *S. C.* 1 Mont. 503.

If bills amounting to 1320*l.* be delivered by the drawer to the creditor as collateral security for a debt of 4000*l.*, and the drawer and acceptor become bankrupt, but the estate of the acceptor prove solvent, the creditor is entitled to receive 20*s.* in the pound on the bills against the estate of the acceptor, and also prove the debt of 4000*l.*, and receive dividends in liquidation of the remaining portion of his debt under the commission against the drawer. *Ex parte Sammon, re Peirson*, 1832. 1 Dea. & Chit. 564.

B. and *G.* carry on business at Manchester as commission agents under the firm of *B.* & Co. *G.* being also a trader on his own separate account at Stockport, under the firm of *G.* & Co., and being likewise a partner with *J.* in London, trading under the firm of *J.* & Co., and with *S. R.* at Stockport, trading under the firm of *S. R.*; *B.* & Co. drew two bills upon *J.* & Co., payable to the order of *B.* & Co., which *J.* and Co. accept, and which are afterwards indorsed by *B.* & Co., *G.* & Co. and *S. R.*; and of which *W.* & Co. became the holders for a valuable consideration, without any knowledge that *G.* was a partner in the house of *B.* & Co., or in that of *J.* & Co. *B.* & *G.* and *J.* severally became bankrupts. The Judges were equally divided on the question whether *W.* & Co. could prove the amount of the bills both

against the joint estate of *B.* & *G.* and the separate estate of *G.*, or whether they must elect: but held, *per tot. Cur.* that the amount of dividends which had been previously declared, though not received by *W.* & Co., under the commission against *J.*, must be deducted from such proof. *Ex parte Moult, re Barrow*, 1832. 1 Dea. & Chit. 44. *S. C.* 1 Mont. 321. Judgments of *Erskine*, C. J. and *Rose*, J. adopted on rehearing before the Lord Chancellor.

DOCKET.

Where a party in the country applied to strike a docket and issue a fiat, on 14th January, on papers sent from Worcester, the day after the issuing of the orders of the 12th January, which papers used the word "commission" instead of "fiat," and upon the application being refused at the office, the papers were sent back to the country to be altered, and in the mean time another party applied for and struck a docket:—Held, that the first applicant was entitled to the fiat upon his amended papers. *Ex parte Lechmere, re Stewart*, 1832. 1 Dea. & Chit. 10. *S. C.* 1 Mont. 510.

When time expired for opening a commission, through the contrivance of the bankrupt, petitioning creditor obtained leave to strike a new docket.

In case of emergency, a petition will be answered instanter. *Re Matthews*, 1832. 1 Dea. & Chit. 35. *S.C.* 1 Mont. 512.

Bond and affidavit were both on same sheet of paper; bond duly sat out the bankrupt's description, but affidavit merely mentioned his name:—Held sufficient. *Ex parte Greybourne*, 1832. 1 Mont. 509.

DOCK WARRANTS.

The custom at the London Docks is to acknowledge no title in wines unless accompanied with possession of dock warrants indorsed by the party to whom they originally issued. Where *A.* received warrants from *B.* not indorsed by *B.*, and *A.* delivered and indorsed them to *C.*, who afterwards procured *B.*'s indorsement, and *A.* became bankrupt:—Held, the wines passed to *C.*, though notice of transfer to dock company, and indorsement by *B.*, were subsequent to the bankruptcy:—Held also, that for want of *B.*'s indorsement to *A.*, and transfer into *A.*'s name in the company's books, *A.* never had the order and disposition of them. *Ex parte Davenport, re Leech*, 1832. 1 Dea. & Chit. 397.

DOUBLE PROOF.

B. & *G.* carry on business at Manchester as commission agents, under the firm of *B.* & Co., *G.* being also

a trader on his own separate account at Stockport, under the firm of *G.* & Co., and being likewise a partner with *J.* in London, trading under the firm of *J.* & Co., and with *S. R.* at Stockport, trading under the firm of *S. R.*; *B.* & Co. drew two bills upon *J.* & Co., payable to the order of *B.* & Co., which *J.* & Co. accept, and which are afterwards indorsed by *B.* & Co., *G.* & Co. and *S. R.*; and of which *W.* & Co. became the holders for a valuable consideration, without any knowledge that *G.* was a partner in the house of *B.* & Co., or in that of *J.* & Co. *B.* & *G.* and *J.* severally became bankrupt; the judges were equally divided on the question whether *W.* & Co. could prove the amount of the bills both against the joint estate of *B.* & *G.*, and the separate estate of *G.*, or whether they must elect:— But held, *per. tot. Cur.*, that the amount of dividends which had been previously declared, though not received by *W.* & Co., under the commission against *J.*, must be deducted from such proof. *Ex parte Moult, re Barrow*, 1832. 1 Dea. & Chit. 44. *S. C.* 1 Mont. 321. Judgment of *Erskine*, C. J. and *Rose*, J. adopted on rehearing before the Lord Chancellor.

ELECTION.

See also LEASE.

From the 10th to the 23d March is a reasonable time for assignees to elect whether they will accept or reject the bankrupt's lease. *Ex parte Fletcher, re Collins*, 1832. 1 Dea. & Chit. 356.

ELECTION UNDER COMMISSION.

Creditor, by petitioning to stay certificate, makes his election to come in under the commission for every proveable debt which may be owing to him from the bankrupt, and therefore the bankrupt must be discharged from any action pending against him by creditors in respect of any such debt, before the petition can be proceeded in. *Ex parte Bostock, re Wright*, 1832. 1 Dea. & Chit. 383.

Plaintiff having proved under a commission of bankrupt in 1816:— Held, estopped to sue for the same debt after the passing of 6 *Geo.* 4. c. 16. s. 59. though that statute repeals 49 *Geo.* 3. c. 121. which makes proof of a debt an election not to sue. *Adams* v. *Bridger*, 1832. 8 Bing. 314.

EMBLEMENTS.

A lease of lands contained a condition, "that, if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and

on which any writ of fieri facias, or any other writ of execution, should issue, it should be lawful for the lessor to re-enter into the demised premises, and "the same again to have, repossess, and enjoy, as in his former estate." The tenant gave a warrant of attorney, upon which judgment was entered up, and his goods taken in execution and sold, and a commission of bankrupt afterwards issued against him. The lessor entered for the forfeiture:—Held, that he was entitled to the emblements. *Davis* v. *Eyton*, 1830. 4 Moore & P. 820.

ENLARGEMENT OF TIME.

See also TIME.

When the time has expired for opening a fiat, the Court will not grant further time for this purpose to the petitioning creditor, merely because he has been negotiating for a composition with the general body of the creditors. *Ex parte Dowton, re Wisden*, 1832. 1 Dea. & Chit. 111.

An order to enlarge the time for the bankrupt's surrender is of course, if applied for six clear days before the day appointed for his surrender. *Ex parte Rose, re Rose*, 1832. 1 Dea. & Chit. 37.

When bankrupt abroad, the time for his surrender will be enlarged. *Ex parte Dodds, re Dodds*, 1832. 1 Dea. & Chit. 76. *S. C.* 1 Mont. 506.

Under special circumstances time enlarged for opening a commission; and a petition was answered for the same day on which the order was applied for. *Ex parte Moody*, 1832. 1 Dea. & Chit. 34. *S. C.* 1 Mont. 512.

Period of eight days, for which a petition was answered, allowed to be enlarged. *Ex parte Beardsworth, re Jones*, 1832. 1 Dea. & Chit. 369.

Time of opening a fiat enlarged, where witness in support of the bankruptcy keeps out of the way, and is summoned by the Commissioner to attend on a future day. *Ex parte Fox, re Bennett*, 1832. 1 Dea. & Chit. 572.

EQUITABLE MORTGAGE.

See also MORTGAGE—COSTS.

The clerk of a creditor claiming an equitable mortgage drew up and signed the memorandum accompanying the deposit of a lease by the bankrupt; but it was not signed by the bankrupt himself, nor was it alleged that the clerk was authorized by the bankrupt to draw up such memorandum, or that it was ever shown to the bankrupt:—Held, under these circumstances, that the equitable mortgagee was not entitled to the

costs of the sale. *Ex parte Reid, re Mills*, 1832. 1 Dea. & Chit. 250.

Where an equitable mortgagee, with a power of sale, had executed the power by putting up the estate to sale, when it was sold to him for 300*l.* and he applied afterwards for the usual order :—Held, that the estate must be put up at that sum. *Ex parte Francis, re Brown*, 1832. 1 Dea. & Chit. 274.

An equitable mortgagee of one partner, for a debt due from the other, may prove his whole debt against the separate estate of that other partner, and retain his security against the first.

Where a petition to prove is unnecessary, the petitioner is liable to costs. *Ex parte Rodgers, re Parkin*, 1832. 1 Dea. & Chit. 38.

Costs of application of mortgagee to bid at the sale ordered to be paid out of the proceeds. *Ex parte Say, re Thornton*, 1832. 1 Dea. Chit. 32. *S. C.* 1 Mont. 364. *Sed vide Ex parte Williams*, 1 Dea. & Chit. 489.

Where on application for sale of equitable mortgage and liberty to bid, one mortgagee being also an assignee, separate solicitor must be appointed for the sale, and assignees not to have conduct of it. *Ex parte Greenwood, re Joy*, 1832. 1 Dea. & Chit. 542.

Where deeds relating to freehold and leasehold property were deposited with an equitable mortgagee, but the memorandum accompanying the deposit merely related to the leasehold property :—Held, that the mortgagee might nevertheless pray a sale of the freehold as well as the leasehold property, subject, however, to the payment of the costs of the sale. *Ex parte Robinson, re Evans*, 1832. 1 Dea. & Chit. 119.

Contrary to the old practice, the Court will not, in general, refer it to the Commissioner to ascertain the existence of an equitable mortgage, but will themselves decide the question. *Ex parte Smith, re Harrison*, 1832. 1 Dea. & Chit. 441. *S. C.* 1 Mont. 514.

Where deeds were deposited for securing 150*l.* to be advanced in cash by discounting bills, and 150*l.* in goods : — Held, the security could not be extended to 162*l.* for cash advanced (the additional 12*l.* being for interest and stamps on a renewed bill,) although only 63*l.* was advanced in goods, but must be limited to the 150*l.* in cash, and 63*l.* in goods ; 213*l.* in toto. *Ex parte Hannen, re Transfield*, 1832. 1 Dea. & Chit. 407.

Where an equitable mortgagee of leasehold property applied for a sale, the Court refused to order him to indemnify the assignees

against any breach of covenants in the lease; but gave the assignees time to consider whether they would accept or reject the lease. *Ex parte Fletcher, re Collins*, 1832. 1 Dea. & Chit. 318.

Where *A.* accepted bills for the accommodation of *B.*, and *B.* deposited title-deeds of *A.*'s with *C.*, the holder of the bills, as security for their payment, a letter from *A.* to *C.* referring to the existence of the debt, and saying "the security you hold is a great deal more than you hold acceptances for on my account, my real account is not more than half you hold, but you have full security for all and more:"—Held, a sufficient acknowledgment of the security to the full amount of bills, though *B.* had no direct authority to pledge. *Ex parte Skinner, re Bell*, 1832. 1 Dea. & Chit. 403.

An equitable mortgagee who applies for a sale will not be allowed the costs of an action at law brought for the mortgage money. *Ex parte Fletcher*, 1832. 1 Mont. 454.

EVIDENCE.

Where original petition is filed and affidavits put in, and then petition is amended by adding the name of another party as respondent, those affidavits cannot be read against him. *Ex parte Mascarenas, re Dawson*, 1832. 1 Dea. & Chit. 507.

Quære, Whether the adjudication need be enrolled under 6 *Geo.* 4. and 1 & 2 *Will.* 4. in order to be evidence on a trial at nisi prius; but to avoid the difficulty, the Court allowed the assignees to have the proceedings in order to inrol the adjudication. *Ex parte Bowden, re Bush*, 1832. 1 Dea. & Chit. 453.

Affidavit of petitioning creditor may be read in opposition to petition to supersede. *Ex parte Lowley, re Lowley*, 1832. 1 Dea. & Chit. 460. *S. C.* 1 Mont. 519.

The party upon whom the affirmative of an issue lies must call the witness who proves that affirmative. *Ex parte Palmer, re Palmer*, 1832. 1 Dea. & Chit. 372.

A witness cannot be cross-examined for the purpose of contradicting him, except on points relevant to the issue. *Ex parte Palmer, re Palmer*, 1832. 1 Dea. & Chit. 373.

In order to let in the declarations of the bankrupt, in proving an act of bankruptcy, what the bankrupt says must be connected or contemporaneous with the act itself. *Ex parte Palmer, re Palmer*, 1832. 1 Dea. & Chit. 373.

Notice of an intention to read certain parts of the proceedings prevents other parts being read. *Ex parte Langley*, 1831. 1 Mont. 355.

In an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action: and if this fact be not proved, the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, has not done so. *Whitworth* v. *Hall*, 1831. 2 B. & Ad. 695.

Parol evidence of any thing that a bankrupt says at the time of his last examination, cannot be received, although it should appear that no part of what he said was taken down in writing. *Rex* v. *Walters*, 1831. 5 Car. & P. 138.

An attorney brought an action against the petitioning creditor under a commission of bankrupt, for business done previous to the assignment:—Held, that notwithstanding the 14th section of the Bankrupt Act (6 *Geo.* 4. c. 16.), he might maintain the action without proof that his charges had been allowed by the commissioners, according to the provisions of that section, as the whole was matter of investigation before the taxing officer. *Fisher* v. *Filmer*, 1831. 5 Car. & P. 92.

Depositions taken before commissioners of bankrupt are conclusive evidence of the bankruptcy under 6 *Geo.* 4. c. 16. s. 92. though the conversion for which the assignees proceed shall have taken place after the act of bankruptcy; for the bankrupt might have sustained an action up to the time of issuing a commission, and if after that event the assignees should recover, payments to them by the defendant would be protected by s. 94, in case the commission should be afterwards superseded. *Fox* v. *Mahony*, 1831. 2 Tyrwhitt, 285. *S.C.* 2 Cromp. & J. 325.

The 45th section of the statute 6 *Geo.* 4. c. 16. imposes a penalty on the provisional assignee, if he does not deliver up the bankrupt's estate to the ultimate assignee. The 67th section enacts, that the suit is not to abate on the death of an assignee, but that it may be prosecuted in the name of the new assignee; and by the 100th section, the sum recovered for a penalty under the act is to be divided among the creditors. An assignee having died, and a suggestion of his death entered upon the record:—Held, that the succeeding assignee was entitled to proceed in a suit which had been commenced by his predecessor against the provisional assignee for a penalty:—Held, also, that as the assignment to the provisional assignee was recited in the assignment to the second assignee, it was not incumbent on the plaintiff to produce it in evidence. *Bates* v. *Sturges*, 1831. 5 Moore & P. 568.

EXAMINATION

Generally and vivâ voce.

The Court of Review has power to examine the bankrupt *vivâ voce* on his petition to supersede the commission. *Ex parte Palmer, re Palmer,* 1832. 1 Dea. & Chit. 375. *See Sayer* v. *Garnett,* 4 Moore & P. 734.

Course of proceeding and rules of evidence on a *vivâ voce* examination on a bankrupt's petition to supersede. *Ex parte Palmer, re Palmer,* 1832. 1 Dea. & Chit. 371.

Court has power under 1 & 2 *Will.* 4. c. 56. s. 38. after hearing case partly by affidavit, to examine *vivâ voce* parties who have made affidavits. *Ex parte Palmer, re Palmer,* 1832. 1 Dea. & Chit. 341. *S.C.* 1 Mont. 497.

When the Court is not satisfied as to the facts sworn to in affidavits, it will order the deponent to be examined *vivâ voce. Ex parte Howell, re Stoddart; Ex parte Timbrell, re Stoddart,* 1832. 1 Dea. & Chit. 358.

The examination of a third person by commissioners is not evidence for the formation of their judgment, but merely a brief to enable them to interrogate the witness. *Re John Goodwin,* 1832. 1 Mont. 304.

Upon an application for an order to examine the parties to a petition as witnesses on the trial of an issue, the Lord Chancellor declined to make such order. *Re Christie,* 1832. 1 Dea. & Chit. 290.

On *vivâ voce* examination of witness, if two assignees appear not in adverse interest by different counsel, only one counsel can examine the witness. *Ex parte Timbrell, re Stoddart,* 1832. 1 Mont. 506.

EXECUTORS.

Commissioners have no power under 6 *Geo.* 4. c. 16. ss. 33 & 34. to examine the executor of a debtor to bankrupt as to amount of the assets that have come to the hands of such executor. *Ex parte Solarte, re Alzedo,* 1832. 1 Dea. & Chit. 311. *S.C.* 1 Mont. 495.

One of three executors becoming bankrupt, the two others may prove against his estate. *Ex parte Brown,* 1832. 1 Dea. & Chit. 118.

EXPUNGING PROOF.

Petition to stay certificate and expunge creditors names from it who have signed it, on ground that he had been previously satisfied his debt, must be served on the creditor. *Ex parte Bostock, re Wright,* 1832. 1 Dea. & Chit. 383.

This Court will not expunge a proof merely because a creditor has instituted process in a foreign country for the recovery of his debt, in the absence of all evidence as to the nature of the process abroad. *Ex parte Cotesworth, re Vanzeller,* 1832. 1 Dea. & Chit. 281.

EXTINGUISHMENT.

Covenant for rent. Plea, that before the rent became due, the defendants, by deed, assigned all their interest in the demised premises to *A. B.*, subject to the payment of the rent and performance of the covenants contained in the lease; and that he, by the assignment, covenanted to pay the rent and perform the covenants contained in the lease; that the defendants delivered the lease to him, and he accepted the same, and entered on the premises by virtue of the assignment: the plea then stated, that *A. B.* became bankrupt, and that the arrears of rent accrued after the date of the commission; that the assignee of his estate declined the lease, and that the bankrupt, within fourteen days after notice of that fact, delivered up such lease to the plaintiffs, devisees of the reversions:—Held, upon demurrer, that the plea was bad, inasmuch as the statute 6 *Geo.* 4. c. 16. s. 75. did not put an end to the lease, but merely discharged the bankrupt from any subsequent payment of the rent or observance of the covenants. *Manning* v. *Flight*, 1832. 3 Barn. & Adol. 211.

FEME COVERT.

The wife of a convicted felon sentenced to transportation beyond the seas for the term of fourteen years, but removed to and confined on board one of the hulks in this country, is liable to be made a bankrupt, if she trade on her own account, although she is in the habit of visiting her husband and holding communications with him during his confinement. *Ex parte Franks*, 1831. 6 Moore & P. 1.

FIAT.

See also COMMISSION—OPENING COMMISSION AND FIAT.

Order necessary to enable same party to issue a new fiat, where, from mistake in former, it had not been prosecuted in time. *Re Edwards*, 1832. 1 Dea. & Chit. 531.

The Court refused leave to amend a fiat which had been opened, on account of a slight misdescription of the bankrupt's residence. *Ex parte Todd, re Jenner*, 1832. 1 Dea. & Chit. 319. *S. C.* 1 Mont. 455.

How a fiat may be amended. *Re Walker*, 1832. 1 Dea. & Chit. 381.

Fiat amended, no proceedings having taken place under it. *Re Graham*, 1832. 1 Dea. & Chit. 458.

Where a joint fiat issues against *A.* and *B.*, and the debt is separate, it is void, and the subsequent superseding it as to *A.* cannot make it good as a separate fiat as to *B.* In such case a petition praying to supersede against *B.* need not state the objection that is relied on. *Ex parte Clarke, re Clarke*, 1832. 1 Dea. & Chit. 544.

Where a party, by pretence of coming

into proposed arrangements with other creditors, protracts the prosecution of a fiat over the fourteen days, and then applies for a new fiat and to supersede first, even if such second fiat be granted, Court will supersede second, and order first to stand; *à fortiori*, if second be not in fact granted, but first is proceeded with, Court will sustain the first under such circumstances. *Ex parte Baker, re Sell*, 1832. 1 Dea. & Chit. 533.

When time expired for opening a commission, through the contrivance of the bankrupt, petitioning creditor obtained leave to strike a new docket:—In case of emergency, petition will be answered instanter. *Re Matthews*, 1832. 1 Dea. & Chit. 35. *S. C.* 1 Mont. 512.

Where all the creditors lived in London, except two, a London fiat was directed, instead of the country commission already issued; which last was ordered to be impounded. *Ex parte Johnson*, 1832. 1 Dea. & Chit. 221.

Fiat unopened allowed to be taken off file to amend. *Re Walker*, 1832. 1 Mont. 510.

FIXTURES.

Quære. Whether fixtures are within the 72d section of the Bankrupt Act. *Ex parte Austin, re King*, 1832. 1 Dea. & Chit. 207.

A lessee of a mill and steam engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the heighth and extent of the mill, and removed all the works of the engine, except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power:—Injunction granted to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building and the new parts of the engine, subject to an action to be brought, by the lessors, to try the right. *Sunderland* v. *Newton*, 1830. 3 Sim. 450.

FOREIGN PROCESS.

This Court will not expunge a proof merely because a creditor has instituted process in a foreign country for the recovery of his debt, in the absence of all evidence as to the nature of the process abroad. *Ex parte Cotesworth, re Vanzeller*, 1832. 1 Dea. & Chit. 281.

FORFEITURE.

In a marriage settlement where part of the trust fund consists of the wife's fortune, a limitation to the husband until bankruptcy, and upon that event for the benefit of the wife and children, is valid to the extent of the wife's proportion of the fund. *Lester* v. *Garland*, 1832. 1 Mont. 471.

A testator bequeathed the dividends of certain stocks to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few week's prior to a codicil confirming it, the nephew took the benefit of the Lords' Act, (1 *Geo.* 4. c. 119.) in the usual way, and some years afterwards the testator died:—Held, that this insolvency operated as a forfeiture of the life-interest given to the nephew by the will. *Yarnold* v. *Moorhouse*, 1830. 1 Russ. & M. 364.

Where stock was given upon trust for *A.* for life, and after his decease for his children, with a proviso that *A.*'s life-interest should not be subject to any alienation or disposition, by sale, mortgage, or otherwise, in any manner whatsoever; and in case he should charge or affect to charge, affect, or incumber the same, such mortgage, sale, or other disposition, so made by him, should operate as a complete forfeiture thereof, and the same should devolve upon the persons next entitled:—Held, that on *A.*'s bankruptcy, his life-interest passed to his assignees to the exclusion of his children. *Lear* v. *Leggett*, 1830. 1 Russ. & M. 690.

FORMS.

See the List, Appendix xxxvii.

FRAUDULENT PREFERENCE.

Where a creditor alleges there has been a fraudulent preference, the Court will, on his petition, send the case for inquiry before the Commissioners, the creditor undertaking to pay the costs of such inquiry. *Ex parte Billing, re Lucas*, 1832. 1 Dea. & Chit. 112.

Under 6 *Geo.* 4. c. 16. a *transfer of goods* in satisfaction of a bonâ fide debt, made voluntarily, and in contemplation of bankruptcy, is an act of bankruptcy, and not protected by the 81st section, though made more than two months before a commission issues. *Bevan* v. *Nunn*, 1832. 9 Bing. 107.

GENERAL ORDERS.

See Appendix, xxiii—lvii.

The Court has resolved to adhere most strictly to the rule followed in the Courts of common law, viz. to strike out every petition when the parties do not appear. If the

petitioner only appears, the cause to be heard; and if respondent only is present, then the petition to be dismissed. General Order, 1832. 1 Mont. 456.

GENERAL ORDERS, CONSTRUCTION OF.

Where a party, by pretence of coming into proposed arrangements with other creditors, protracts the prosecution of a fiat over the 14 days, and then applies for a new fiat and to supersede the first, even if such second fiat be granted, Court will supersede second, and order first to stand; *à fortiori*, if second be not in fact granted, but first is proceeded with, Court will sustain the first under such circumstances. *Ex parte Baker, re Sell*, 1832. 1 Dea. & Chit. 533.

It is no objection to the granting the certificate that the date of the signatures was attached by a third person, if it be so done before the creditor signs his name.

General orders may be dispensed with under circumstances, in discretion of Court. *Ex parte Reynolds, re Reynolds*, 1832. 1 Dea. & Chit. 459. *S. C.* 1 Mont. 508.

The General Order 8 March 1794 does not authorize the Commissioners to order a sale of an estate on which an annuity is charged, for payment of the value of the annuity. *Re Delves*, 1831. 1 Mont. 492.

HEARING, POSTPONEMENT.

The late receipt of affidavits, and consequent non-delivery of briefs to counsel, is no cause for putting off a petition, as the briefs ought to have been delivered without waiting for the affidavits. *Ex parte Bell, re Smith*, 1832. 1 Dea. & Chit. 496.

HUSBAND AND WIFE.

Where a bankrupt, in consideration of his wife's fortune, gave a bond to trustees to pay them 3000*l.*, as to which by the terms of a settlement it was declared that the bankrupt should be entitled to the interest during his life, and after his death the principal was to go to his wife, and the bankrupt made default in the payment of his money:—Held, that the trustees might prove for 3000*l.*, and that the interest upon the dividends to be received under such proof should accumulate until the 3000*l.* should be realized; after which, but not before, the interest might be paid to the assignees for the benefit of the creditors. *Ex parte Turpin, re Brown*, 1832. 1 Dea. & Chit. 120. *S. C.* 1 Mont. 443.

Where the contingency depends upon the separation of husband and wife, and of a widow's not marrying, it is not within 6 *Geo.* 4. c. 16. s. 56. *Ex parte Davis, re Wentworth*, 1831. 1 Mont. 297.

IMPERTINENCE.

The Court will not, before hearing of petition, decide whether impertinent matter exist in affidavits: Court came to the same determination in *Ex parte Arnsby, re Lord*, 7 November 1832. Mr. *Wright* applied: but *secus* as to scandalous matter. *Ex parte Williamson, re Williamson*, 1832. 1 Dea. & Chit. 529.

INDEMNITY.

Where equitable mortgagee of leasehold property applied for sale, the Court refused to order him to indemnify the assignees against any breach of covenants in lease, but gave them time to accept or reject. *Ex parte Fletcher, re Collins*, 1832. 1 Dea. & Chit. 318.

INDICTMENT.

A bankrupt is not indictable on the statute 6 *Geo.* 4. c. 16. s. 112. for concealing his books, till after he has concluded his last examination. *Rex* v. *Walters*, 1831. 5 Car. & P. 138.

Whether, on such an indictment, the petitioning creditor is a competent witness to prove the petitioning creditor's debt. *Quære. Rex* v. *Walters*, 1831. 5 Car. & P. 138.

INJUNCTION.

A lessee of a mill and steam-engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the height and extent of the mill, and removed all the works of the engine, except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power. Injunction granted to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building, and the new parts of the engine, subject to an action to be brought by the lessors to try the right. *Sunderland* v. *Newton*, 1830. 3 Sim. 450.

INROLMENT.

Quære, Whether the adjudication need be inrolled under 6 *Geo.* 4. and 1 & 2 *Will.* 4. in order to be evidence on a trial at nisi prius, but to avoid the difficulty the Court allowed the assignees to have the proceedings in order to inrol the adjudication. *Ex parte Bowden, re Bush*, 1832. 1 Dea. & Chit. 453.

One of two assignees petitioned that his co-assignee, or the solicitor to the commission, (one of whom had the custody of the proceedings,) might inrol them, pursuant to 6 *Geo.* 4. c. 16. s. 96.—Held, that before he petitioned for this purpose, he ought first to have applied to the co-assignee, or solicitor, to produce the proceedings at the office for inrolment. *Ex parte Evans, re Ford*, 1832. 1 Dea. & Chit. 353.

INSOLVENCY.

A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the Lords' Act (1 *Geo.* 4. c. 119,) in the usual way; and some years afterwards the testator died: —Held, that this insolvency operated as a forfeiture of the life interest given to the nephew by the will. *Yarnold* v. *Moorhouse*, 1830. 1 Russ. & M. 364.

An *insolvent's petition is said to be filed* when it reaches its place of final custody, and not when it first comes to the hands of the officer of the Court. *Garlick* v. *Sangster*, 1832. 9 Bing. 46.

INSURANCE COMPANY.

A letter to the secretary of an insurance office, in which the writer says, "I am holder of the undermentioned policies," and inquires what the office would give for them, is sufficient notice of an assignment. *Ex parte Stright, re Eyles*, 1832. 1 Mont. 502.

INTEREST.

When there is a surplus upon the estate of three, which is indebted to two, the creditors of the three are entitled to interest before the surplus is carried to the estate of the two. *Ex parte Ogle, re Hurst & Robinson*, 1831. 1 Mont. 350.

ISSUE AT LAW.

Under the 1 & 2 *Will.* 4. c. 56. s. 17. a bankrupt cannot proceed on a petition to supersede in this Court and also have an issue at law; he must elect his remedy: and petition being part heard, he is precluded from an issue. *Ex parte Williamson, re Williamson*, 1832. 1 Dea. & Chit. 549.

JUDGMENT.

After a commission of bankruptcy was sued out against the plaintiff, the defendant signed judgment as in case of a nonsuit, taxed the costs, and sued out execution. The first day of the term, to which the judgment related, was before the com-

mission was issued:—Held, that the costs were not provable under the commission, as they did not constitute a debt till judgment was actually signed, and that although the plaintiff had obtained his certificate, he was still liable for such costs. *Brough* v. *Adcock*, 1831. 5 Moore & P. 678.

JURISDICTION.

The Court has power, under 1 & 2 *Will.* 4. c. 56. s. 38. after hearing a case partly by affidavit, to examine *vivâ voce*, parties who have made affidavits. *Ex parte Palmer, re Palmer*, 1832. 1 Dea. & Chit. 341. *S.C.* 1 Mont. 497.

The Court of Review has no jurisdiction to hear petition of appeal to Lord Chancellor from order of Vice Chancellor, nor a petition for rehearing a petition of appeal already heard by Lord Chancellor, nor cross-petition of appeal to Lord Chancellor complaining of particular part of order of Vice Chancellor. *Secus* as to petition to Lord Chancellor for confirming the Master's report, where Lord Chancellor had made an order on a previous petition, referring the matters therein to the Master; or a supplemental petition of appeal to Lord Chancellor from order of Vice Chancellor, where such petition is on new grounds, which were not brought forward by the original petition or by the petition of appeal, or a petition to the Lord Chancellor praying only consequential directions on one part of an order by Vice-Chancellor, against which no petition of appeal had been presented. *Ex parte Benson*, and *Ex parte Lancaster Canal Company, re Dilworth; Ex parte Langston, re Hardy; Ex parte Elsee, re Joyner*, 1832. 1 Dea. & Chit. 324.

Commissioners have no power under 6 *Geo.* 4. c. 16. ss. 33 & 34. to examine the executor of a debtor to bankrupt as to amount of assets that have come to his hands as executor. *Ex parte Solarte, re Alzedo*, 1832. 1 Dea. & Chit. 311. *S.C.* 1 Mont. 495.

A petition presented to Lord Chancellor before 11th January 1832, to supersede, an action at law was directed to try validity of commission, costs reserved. Verdict in favour of petitioner. A new petition was thereupon presented to the Court of Review and granted:—Held, petitioner was entitled to costs of both petitions, and that C. R. had no jurisdiction in question, whether the petitioning creditor could set off the debt really due to him against those costs. *Ex parte Thomas, re Thomas*, 1832. 1 Dea. & Chit. 443.

The Court of Review has power to examine the bankrupt *vivâ voce* on his petition to supersede the com-

mission. *Ex parte Palmer, re Palmer,* 1832. 1 Dea. & Chit. 375.

The Lord Chancellor has no jurisdiction to order a fiat to be amended. *Re Wright,* 1832. 1 Dea. & Chit. 547.

Although all the creditors, save one, and the bankrupt and assignees consent, the Court cannot direct that the official assignee be at liberty to award a party a remuneration for trouble incurred touching the bankrupt's estate, between the time of stopping payment and issuing the fiat. Nor can it direct the Commissioner to ascertain if proper. *Ex parte Burles, re May,* 1832. 1 Dea. & Chit. 543.

A creditor, resting upon a common law lien, without proving under the commission previous to the Bankruptcy Court Act, appeared as a respondent, in opposition to a petition before the Vice-Chancellor, who ordered that the matter should be referred to the Commissioners, to ascertain the rights of the several parties, and that the creditor should have his costs. The creditor attended the inquiry before the Commissioners, but did not draw up the order of the Vice-Chancellor: — Held, that this was not enough to bring him within the jurisdiction of the Court.

Held also, that filing an affidavit is not a waiver of any objection to the jurisdiction. *Ex parte Reid, re Mills,* 1832. 1 Dea. & Chit. 250.

This Court has jurisdiction to hear a petition of appeal in bankruptcy from the Vice-Chancellor's decision to the Lord Chancellor, provided the party prefers a fresh petition addressed to this Court, for the purpose of having such petition heard. *Ex parte Lowe, &c. re Aaron,* 1832. 1 Dea. & Chit. 79. But *see Ex parte Benson, &c. id.* 324.

This Court has no jurisdiction to hear petitions addressed to the Lord Chancellor. *Re Appling,* 1832. 1 Dea. & Chit. 7. *S. C.* 1 Mont. 512.

The Lord Chancellor has no jurisdiction to hear a petition of appeal from the Vice Chancellor in bankruptcy since the 1 & 2 *Will.* 4. c. 56. *Ex parte Lowe, re Aaron,* 1832. 1 Dea. & Chit. 30. *Sed vide Ex parte Benson, id.* 324.

Court cannot proceed towards commitment of party for non-payment of costs on the usual seven days order of the Vice-Chancellor. *Ex parte Ferris,* 1832. 1 Dea. & Chit. 498. *S. C.* 1 Mont. 513.

LACHES.

A bankrupt cannot petition to supersede a commission on the ground of the insufficiency of the petitioning creditor's debt, when he has lain by two years without adopting any proceeding for that purpose.

A petition is not necessarily dismissed with costs, because a previous petition for the same object has been also dismissed, if the dismissal of the prior petition was on a mere matter of form. *Ex parte Hooper, re Hooper*, 1832. 1 Dea. & Chit. 117.

Assignees applying to prove, are not bound by the same laches as might bind a mere individual creditor. *Ex parte Smith, re Marsh*, 1832. 1 Dea. & Chit. 267.

Where creditor does not use due diligence to prove his debt, he is not entitled to petition to stay bankrupt's certificate in order to afford him time to do so with a view to his dissenting from its allowance.

An affidavit by bankrupt in answer to such a petition, filed two days before hearing, may be read: but if it makes any charge of delay against petitioner, which he wishes to explain, the Court will give him time for that purpose, more especially if the amount of his debt would turn the certificate.

A petition to stay, &c. and expunge creditor's name from certificate, who had signed it, on the ground that he had been previously satisfied his debt, must be served on the creditor.

A creditor, by petitioning to stay certificate, makes his election to come in under commission for every provable debt which may be owing him from bankrupt, and therefore the bankrupt must be discharged from any action pending against him by the former in respect of any such debt, before petition can be proceeded in.

Assignees cannot be heard on petition by individual creditor to stay bankrupt's certificate, though they may have been served with petition. *Ex parte Bostock, re Wright*, 1832. 1 Dea. & Chit. 383.

LANDLORD AND TENANT.

A landlord distrained for rent in arrear before the bankruptcy of his tenant, and when the goods were appraised left them on the premises for the use of the bankrupt's wife, the bankrupt himself being in prison. After the bankruptcy, the landlord distrained again for the very same arrears of rent:—Held, that the second distress was void, and that the goods passed to the assignees, as being in the order and disposition of the bankrupt at the time of his bankruptcy. *Ex parte Bradly, re Deane*, 1832. 1 Dea. & Chit. 223.

A lease of lands contained a condition, "that if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fieri facias*,

or any other writ of execution, should issue," it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, repossess, and enjoy, as in his former estate. The tenant gave a warrant of attorney, upon which judgment was entered up, and his goods taken in execution and sold, and a commission of bankrupt afterwards issued against him. The lessor entered for the forfeiture : — Held, that he was entitled to the emblements. *Davis* v. *Eyton*, 1830. 4 Moore & P. 820.

A lessee of a mill and steam-engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the height and extent of the mill, and removed all the works of the engine, except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power. Injunction granted to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building, and the new parts of the engine, subject to an action to be brought by the lessors to try the right. *Sunderland* v. *Newton*, 1830. 3 Sim. 450.

LEASE.

See ELECTION.

From the 10th to the 23d March is a reasonable time for assignees to elect whether they will accept or reject the bankrupt's lease. *Ex parte Fletcher, re Collins*, 1832. 1 Dea. & Chit. 356.

Where equitable mortgagee of leasehold property applied for sale, the Court refused to order him to indemnify the assignees against any breach of covenants in the lease, but gave them time to accept or reject. *Ex parte Fletcher, re Collins*, 1832. 1 Dea. & Chit. 318.

A lease of lands contained a condition, " that if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fieri facias*, or any other writ of execution, should issue," it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, repossess, and enjoy, as in his former estate. The tenant gave a warrant of attorney, upon which judgment was entered up, and his goods taken in execution and sold, and a commission of bankrupt afterwards issued against him. The lessor entered for the forfeiture :—Held, that he was entitled to the emblements. *Davis* v. *Eyton*, 1830. 4 Moore & P. 820.

By indenture of demise, reciting that the lessee had purchased certain fixtures on the premises, on condition of their being repurchased as aftermentioned, it was agreed between the lessor and lessee, and the lessor covenanted, that on the expiration or other sooner determination of the term, he, the lessor, should and would take the fixtures at such price as they should be appraised at by two competent persons, one to be named on each side. The lessee became bankrupt, and his assignee declined the lease (which was delivered up), but he required the fixtures to be repurchased, and brought an action of covenant against the lessor for not appointing an appraiser:—Held, that as by 6 *Geo.* 4. c. 16. s. 75. the bankrupt, on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant in question could not be enforced by the assignee against the lessor. *Kearsey* v. *Carstairs*, 1831. 2 B. & Ad. 716.

Covenant for rent. Plea, that before the rent became due, the defendants, by deed, assigned all their interest in the demised premises to *A. B.*, subject to the payment of the rent and performance of the covenants contained in the lease; and that he, by the assignment, covenanted to pay the rent and perform the covenants contained in the lease; that the defendants delivered the lease to him, and he accepted the same, and entered on the premises by virtue of the assignment: the plea then stated, that *A. B.* became bankrupt, and that the arrears of the rent accrued after the date of the commission; that the assignee of his estate declined the lease, and that the bankrupt, within fourteen days after notice of that fact, delivered up such lease to the plaintiffs, devisees of the reversions:—Held, upon demurrer, that the plea was bad, inasmuch as the statute 6 *Geo.* 4. c. 16. s. 75. did not put an end to the lease, but merely discharged the bankrupt from any subsequent payment of the rent or observance of the covenants. *Manning* v. *Flight*, 1832. 3 Barn. & Adol. 211.

LEAVE TO BID.

See also EQUITABLE MORTGAGE—COSTS.

Mortgagee applying for leave to bid, must always pay costs of petition, unless consent otherwise. *Ex parte Williams, re Hall*, 1832. 1 Dea. & Chit. 489.

LEAVE TO EXCEPT.

Leave to except to the report of an officer of this Court need not be applied for. *Ex parte Crockwell, re Crockwell*, 1832. 1 Dea. & Chit. 546.

LENGTH OF TIME.

See also LACHES—TIME.

Bankrupt is not prevented by 1 & 2 *Will.* 4. c. 56. s. 17. from applying to supersede, although two months have elapsed from date of adjudication. *Ex parte Palmer, re Palmer,* 1832. 1 Dea. & Chit. 341. *S. C.* 1 Mont. 497.

In 1811 *A.* and *B.* entered into a partnership, which continued till 1818, when it was dissolved, and the affairs wound up, except as to some outstanding debts. In 1820 a deed of release was executed, from which these debts were excluded. Partnership books relating generally to these and other debts were all along suffered to remain in the hands of *A.* All the outstanding debts were subsequently settled. In 1830 *B.* was declared bankrupt, till which time the books were never called for by *B.* :—Held, that *A.* and *B.* nevertheless continued tenants in common in respect of them, and that the length of time did not affect that relationship; and, therefore, although there was no charge of fraud in the settled account, yet the Commissioner had jurisdiction to call *A.* before him, and examine him and the books, relative to the former dealings of the bankrupt. *Ex parte Trueman, re Martindale,* 1832. 1 Dea. & Chit. 464.

LIEN.

A bankrupt having employed *A.*, a solicitor, to procure signatures of creditors to his certificate, and then ceased to employ him, cannot oblige his, *A.*'s, clerk to make affidavit of witnessing the signatures without first paying *A.* his costs for such business. *Ex parte Shore, re Lucas,* 1832. 1 Dea. & Chit. 509.

An accountant who has been employed in a bankruptcy has no lien on the bankrupt's certificate for the payment of his costs. *Anon.* 1831. 1 Russ. & M. 330.

LIMITATION.

See STATUTE OF LIMITATIONS.

LOCUS STANDI IN CURIA.

The Court of Review will not hear the petition of a bankrupt to supersede a fiat until he has surrendered, notwithstanding the petition is presented before the forty-second day, and the petition comes on before the time of surrendering has expired. *Ex parte Drake, re Drake,* 1832, 1 Mont. 486. *See also Ex parte Helsby,* 1 Dea. & Chit. 16.

LODGING-HOUSE-KEEPER.

The keeper of a private lodging-house, who also seeks a profit by furnishing her guests with provisions, is subject to the bankrupt laws as an hotel keeper, although the provisions are set apart as the private property of each guest. *Smith* v. *Scott,* 1832. 9 Bing. 14.

MALICIOUS COMMISSION.

In an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action; and if this fact be not proved the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, has not done so. *Whitworth* v. *Hall*, 1831. 2 B. & Ad. 695.

MARRIAGE SETTLEMENT.

A bankrupt covenanted by his marriage settlement, that his heirs, executors, &c. should, within twelve months after his decease, pay 4000*l.* to trustees, upon trust to pay the interest to his intended wife for her life; and after her death then to pay the principal sum to the children of the marriage; and if no children, to the wife, if she survived her husband; but if not, then to the executors of the husband:—Held, that this covenant constituted a debt contracted by the bankrupt, payable on a contingency, and capable of valuation; and therefore provable within the 56th section 6 *Geo.* 4. c. 16. *Ex parte Tindal, re Gibbins*, 1832. 1 Dea. & Chit. 291. *S. C.* 1 Mont. 375, 462; 8 Bing. 402.

Where a bankrupt, in consideration of his wife's fortune, gave a bond to trustees to pay them 3000*l.*, as to which, by the terms of a settlement, it was declared that the bankrupt should be entitled to the interest during his life, and after his death the principal was to go to his wife; and the bankrupt made default in the payment of his money:—Held, that the trustees might prove for 3000*l.*, and that the interest upon the dividends to be received under such proof should accumulate until the 3000*l.* should be realized; after which, but not before, the interest might be paid to the assignees for the benefit of the creditors. *Ex parte Turpin, re Brown*, 1832. 1 Dea. & Chit. 120. *S. C.* 1 Mont. 443.

MEETING TO TAKE BANKRUPT'S EXAMINATION.

See also EXAMINATION.

Where the bankrupt, after attending the last meeting before the Commissioners, inadvertently absented himself without passing his last examination, the Court, on his petition, ordered a fresh meeting for that purpose. *Ex parte Dixon, re Dixon*, 1832. 1 Dea. & Chit. 351.

MISTAKE.

In 1806 *P.* proves a debt against the estate of *B.* & Co. bankrupts, on a bill of exchange, and dies in 1807, appointing *G.* his executor; *G.* becomes bankrupt in 1816, and obtains his certificate in 1817: but before that time, viz. in the years

1811, 1814, 1815, *G.* had, as executor, received three dividends on *P.*'s debt, and after his certificate in 1817, 1822, and 1828 he receives three other dividends. It afterwards turns out, that the bill of exchange was paid by another party in 1807, so that no dividend was ever due. On petition by *B.* & Co.'s assignees to expunge the proof, and that *G.* should refund the six dividends:—Held, first, that it being in the nature of a trust, the statute of limitations did not run in favour of *G.* But, second, that as the first three dividends were paid in error, and constituted a legal debt against *G.*, and might have been proved under his bankruptcy, the claim as to them was barred by *G.*'s certificate. The three dividends received since his bankruptcy were ordered to be refunded. *Ex parte Bolton, re Baillie*, 1832. 1 Dea. & Chit. 556.

Where a party in the country applied to strike a docket and issue a fiat, on 14th January, on papers sent from Worcester, the day after the issuing of the orders of the 12th January, which papers used the word "commission" instead of "fiat," and upon the application being refused at the office, the papers were sent back to the country to be altered, and in the mean time another party applied for and struck a docket:—Held, that the first applicant was entitled to the fiat upon his amended papers. *Ex parte Lechmere, re Stewart*, 1832. 1 Dea. & Chit. 10. *S. C.* 1 Mont. 510.

MORTGAGE, MORTGAGOR AND MORTGAGEE.

See also EQUITABLE MORTGAGE—COSTS.

Mortgagee applying for leave to bid must always pay costs of petition, unless consent otherwise. *Ex parte Williams, re Hall*, 1832. 1 Dea. & Chit. 489. *S. C.* 1 Mont. 514.

Mortgagee's costs to be paid out of the proceeds of the sale. *Ex parte Browne, re Clarke*, 1832. 1 Dea. & Chit. 34. *Sed vide Ex parte Williams, id.* 489.

When mortgaged property is sold, and the same solicitor is concerned for the assignees and the mortgagees, a separate solicitor should be appointed for the purposes of the sale. *Ex parte Rolfe, re Johnson*, 1832. 1 Dea. & Chit. 77. *S. C.* 1 Mont. 515.

A mortgagee petitioned for the sale of his security, and to be permitted to prove the full amount of his debt in a suit for the administration of the assets of the deceased mortgagor:—Held, that he could prove only for so much of his debt as might remain unpaid by the produce of the mortgaged estate, according to the rule in bankruptcy.

Greenwood v. *Taylor*, 1830. 1 Russ. & M. 185.

MOTION.

Motion to postpone petition in paper of the day, heard in precedence of the day's paper, though opposed. *Ex parte Clarke, re Sewerkrop*, 1832. 1 Dea. & Chit. 452.

Where petition to supersede was presented to the Lord Chancellor before 11th January 1832, in order to save expense of new petition, service of motion on assignees that prayer of petition may be granted by Court of Review sufficient. *Ex parte Embden, re Embden*, 1832. 1 Dea. & Chit. 461. *S.C.* 1 Mont. 518.

On application tending to enforce a party to take the office of assignee upon him against his wish, he must be served with notice of it. *Ex parte Green, re Ridley*, 1832. 1 Dea. & Chit. 487.

One day's notice of motion to vary order insufficient. *Ex parte Giles, re Giles*, 1832. 1 Dea. & Chit. 552.

Notice must be given to the other side of the application to discharge an order. *Ex parte Lowe, re Aaron*, 1832. 1 Dea. & Chit. 43.

Whatever ground there may be for the discharge of a party who is arrested on an attachment for not paying costs pursuant to an order, previous notice of the application must be given to the other side. *Ex parte White, re Scrivenor*, 1832. 1 Dea. & Chit. 39. *S. C.* 1 Mont. 517.

MUTUALITY OF CONTRACT.

By indenture of demise, reciting that the lessee had purchased certain fixtures on the premises, on condition of their being repurchased as after-mentioned, it was agreed between the lessor and lessee, and the lessor covenanted, that on the expiration or other sooner determination of the term, he, the lessor, should and would take the fixtures at such price as they should be appraised at by two competent persons, one to be named on each side.

The lessee became bankrupt, and his assignee declined the lease (which was delivered up), but he required the fixtures to be re-purchased, and brought an action of covenant against the lessor for not appointing an appraiser: — Held, that as by 6 *Geo.* 4. c. 16. s. 75. the bankrupt, on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant in question could not be enforced by the assignee against the lessor. *Kearsey* v. *Carstairs*, 1831. 2 B. & Ad. 716.

NOTICE.

On application tending to enforce a

party to take the office of assignee upon him against his wish, he must be served with notice of it. *Ex parte Green, re Ridley*, 1832. 1 Dea. & Chit. 487.

One day's notice of motion to vary order insufficient. *Ex parte Giles, re Giles*, 1832. 1 Dea. & Chit. 552.

Notice must be given to the other side of the application to discharge an order. *Ex parte Lowe, re Aaron*, 1832. 1 Dea. & Chit. 43.

A party intending to use affidavits already filed in support of a petition to the Lord Chancellor, which is transferred to this Court, must give notice to the other side. *Ex parte Donaldson, re Wright*, 1832. 1 Dea. & Chit. 36. *S. C.* 1 Mont. 520.

Whatever ground there may be for the discharge of a party who is arrested on an attachment for not paying costs pursuant to an order, previous notice of the application must be given to the other side. *Ex parte White, re Scrivenor*, 1832. 1 Dea. & Chit. 39. *S. C.* 1 Mont. 517.

Traders in copartnership having admitted a dormant partner, his share in the joint stock is in the order and disposition of the ostensible partners, and distributable as such: but the creditors of the new firm and creditors of the old firm, who had notice that a dormant partner had been admitted, are entitled to prove their debts *pari passu* with the other creditors of the old firm. *Ex parte Chuck, re Starkey*, 1832. 3 Mont. 457. *S. C.* 8 Bing. 469.

A letter to the secretary of an insurance office, in which the writer says, "I am holder of the undermentioned policies," and inquires what the office would give for them. is sufficient notice of an assignment, *Ex parte Stright, re Eyles*, 1832. 1 Mont. 502.

OFFICERS OF COURT.

See also SECRETARY OF BANKRUPTS.

Leave to except to the report of an officer of this Court need not be applied for. *Ex parte Crockwell, re Crockwell*, 1832. 1 Dea. & Chit. 546.

OFFICIAL ASSIGNEE.

See also ASSIGNEE.

Where official assignee had been appointed under an old commission, on suggestion that majority of creditors objected to such appointment, the Court, on motion, suspended an order for delivering up of proceedings, &c. to official assignee till hearing of petition. *Ex parte Parker, re Crickett*, 1832. 1 Dea. & Chit. 530.

An official assignee having sent to the petitioner (who was employed under the commission to sell part of the bankrupt's property) the usual circular, that a dividend was due on his debt, cannot afterwards refuse to pay the same upon the plea that

his accounts for such business done by him are erroneous. *Ex parte Alexander, re Elder,* 1832. 1 Dea. & Chit. 513. *S. C.* 1 Mont. 503.

OPENING COMMISSION AND FIAT.

See also PETITIONING CREDITOR.—COMMISSION.—FIAT.

Under special circumstances time enlarged for opening a commission; and a petition was answered for the same day on which the order was applied for. *Ex parte Moody,* 1832. 1 Dea. & Chit. 34. *S. C.* 1 Mont. 512.

When the time has expired for opening a fiat, the Court will not grant further time for this purpose to the petitioning creditor, merely because he has been negociating for a composition with the general body of the creditors. *Ex parte Dowton, re Wisden,* 1832. 1 Dea. & Chit. 111.

The circumstance of a petitioning creditor residing at a distance of 85 miles from the place where the fiat is to be opened, is not of itself a sufficient reason for dispensing with his personal attendance before the Commissioners to prove his debt. *Ex parte Cox,* 1 Dea. & Chit. 205. *S. C.* 1 Mont. 390.

Personal attendance of petitioning creditor at opening of commission 200 miles off, dispensed with on ground of personal inconvenience. *Ex parte Ross, re Kirby,* 1832. 1 Dea. & Chit. 552.

Petitioning creditor's attendance at opening fiat dispensed with on account of age and illness, and also signature of petitioner dispensed with. *Re Wood,* 1832. 1 Mont. 509.

ORDER TO STAY CERTIFICATE.

See also CERTIFICATE.—PETITION TO STAY CERTIFICATE.

Where bankrupt's certificate stayed to give a creditor time to prove, and that creditor is paid, certificate will be allowed, notwithstanding the order to stay. *Re Hall,* 1832. 1 Mont. 508.

OPERATION OF 6 GEO. IV. c. 16.

See also STATUTE OF.

The charge of 20*l.* per cent. imposed on assignees by 6 *Geo.* 4. c. 16. s. 104. for retaining the bankrupt's money in their hands, the bankrupt himself has no legal nor equitable claim to, either in respect of his allowance or his rights to the surplus. *Pell,* J. dissent. *Quære,* Whether this charge is to be 20*l.* per cent. per annum, during the whole period of retention, or only one single charge of 20*l.* per cent. upon the gross sum retained? *Quære.* Whether the charge can be sustained on monies retained by assignees previous to the 1st Sep-

tember 1825, when the 6 *Geo.* 4. c. 16. first came into operation? *Ex parte Lowe, re Aaron*, 1832. 1 Dea. & Chit. 137. *S. C.* 1 Mont. 392.

ORDER.

Order necessary to enable same party to issue a new fiat, where, from mistake in former, it had not been prosecuted in time. *Re Edwards*, 1832. 1 Dea. & Chit. 531.

Where official assignee had been appointed under an old commission, on suggestion that majority of creditors objected to such appointment, the Court, on motion, suspended an order for delivery up of proceedings, &c., to official assignee till hearing of petition. *Ex parte Parker, re Crickett*, 1832. 1 Dea. & Chit. 530.

When Court makes a General Order for examination of parties, on hearing petition, there is no need of a special order as to any particular witness, but proper course is to take out *subpœna ad testificandum*. *Ex parte Palmer, re Palmer*, 1832. 1 Dea. & Chit. 341. *S. C.* 1 Mont. 497.

A petition cannot be reheard, unless the order made in the former hearing is drawn up. *Ex parte Jenkins, re Nokes*, 1832. 1 Dea. & Chit. 222. *S. C.* 1 Mont. 513.

Notice must be given to the other side of the application to discharge an order. *Ex parte Lowe, re Aaron*, 1832. 1 Dea. & Chit. 43.

OUTLAWRY.

The bankrupt, during the forty days allowed for his examination, is, for the benefit of his creditors, privileged from arrest, even upon a *capias ut lagatum*. *Ex parte Helsby, re Helsby*, 1832. 1 Dea. & Chit. 16. *S. C.* 1 Mont. 355.

PARTIES.

See PETITION, SERVICE.—PETITION, FORM.

PARTNERS.

A. B. and *C.* are bankrupts. Their joint estate pays 9*s.* in the pound; the separate assets of *A.* and *B.* contribute sufficient to make a dividend of 15*s.* in the pound, but *C.*'s separate estate contributes nothing: Held, nevertheless, he was entitled to allowance under 6 *Geo.* 4. c. 16. ss. 128, 129. *Ex parte Morris, re Morris*, 1832. 1 Dea. & Chit. 526. *S. C.* 1 Mont. 505.

An equitable mortgagee of one partner, for a debt due from the other, may prove his whole debt against the separate estate of that other partner, and retain his security against the first.

Where a petition to prove is unnecessary, the petitioner is liable to costs. *Ex parte Rodgers, re Parkin*, 1832. 1 Dea. & Chit. 38.

A solvent partner is entitled to retain the partnership books when the other becomes bankrupt. *Ex parte Finch, re Coverdale,* 1832. 1 Dea. & Chit. 274.

In 1811, *A.* & *B.* entered into a partnership, which continued till 1811, when it was dissolved, and the affairs wound up, except as to some outstanding debts. In 1820, a deed of release was executed, from which these debts were excluded. Partnership books relating generally to these and other debts were all along suffered to remain in *A.*'s hands. All the outstanding debts were subsequently settled. In 1830 *B.* was declared bankrupt, till which time the books were never called for by *B.*:—Held, that *A.* & *B.* nevertheless continued tenants in common in respect of them, and that the length of time did not affect that relationship, and, therefore, although there was no charge of fraud in the settled account, yet the Commissioner had jurisdiction to call *A.* before him, and examine him and the books relative to the former dealings of the bankrupt. *Ex parte Trueman, re Martindale,* 1832. 1 Dea. & Chit. 464.

When there is a surplus upon the estate of three, which is indebted to two, the creditors of the three are entitled to interest before the surplus is carried to the estate of the two. *Ex parte Ogle, re Hurst,* 1831. 1 Mont. 350.

Traders in copartnership having admitted a dormant partner, his share in the joint stock is in the order and disposition of the ostensible partners, and distributable as such; but the creditors of the new firm and creditors of the old firm, who had notice that a dormant partner had been admitted, are entitled to prove their debts *pari passu* with the other creditors of the old firm. *Ex parte Chuck, re Starkey,* 1832. 1 Mont. 457. *S. C.* 8 Bing. 469.

PAYMENTS PROTECTED.

See also STATUTES, CONSTRUCTION OF.

A trader, in a state of insolvency, and concealing himself from his general creditors, after a secret act of bankruptcy in part payment of a debt, delivered a bill of exchange to a creditor who was acquainted with his place of retreat, and with whom he was in friendly communication:—Held, that this was not a payment protected by the 82d section of the statute 6 *Geo.* 4. c. 16. *Bagnall* v. *Andrews,* 1830. 4 Moore & P. 839.

In an action by assignees of a bankrupt for money had and received, it appeared that the bankrupt was indebted to the defendant on a bill of exchange, drawn by the bankrupt upon and accepted by his father; that ten days before the bill became due, the defendant threatened to arrest the bankrupt and his

father, if it were not paid, when the bankrupt paid the amount to the defendant. On the bankrupt being called as a witness, he stated that his object in paying the defendant was to secure his (the bankrupt's) father, at the same time to benefit the defendant; that he did not recollect that the defendant had used any threat, and that he did not contemplate bankruptcy at the time; but he committed an act of bankruptcy a few hours afterwards. It was left to the jury to say, whether, under all these circumstances, the payment was made in contemplation of bankruptcy, and voluntarily, or in consequence of a threat from the defendant; and that it was for them to consider what was passing in the bankrupt's mind at the time of the payment, and the probable motives by which he was actuated :—Held, that such direction was proper; and the jury having found that the payment was voluntary, the Court refused to disturb the verdict. *Cook* v. *Rogers*, 1831. 5 Moore & P. 353.

PETITION, GENERALLY.

This Court has jurisdiction to hear a petition of appeal in bankruptcy, from the Vice-Chancellor's decision to the Lord Chancellor, provided the party prefers a fresh petition addressed to this Court, for the purpose of having such petition heard. *Ex parte Lowe, re Aaron*, 1832. 1 Dea. & Chit. 79. *Sed vide Ex parte Benson, re Dilworth, id.* 324.

When time expired for opening a commission, through the contrivance of the bankrupt, petitioning creditor obtained leave to strike a new docket.

In case of emergency, a petition will be answered instanter. *Re Matthews*, 1832. 1 Dea. & Chit. 35. *S.C.* 1 Mont. 512.

Under special circumstances, time enlarged for opening a commission; and a petition was answered for the same day on which the order was applied for. *Ex parte Moody*, 1832. 1 Dea. & Chit. 34. *S.C.* 1 Mont. 512.

A petition cannot be reheard, unless the order made in the former hearing is drawn up. *Ex parte Jenkins, re Nokes*, 1832. 1 Dea. & Chit. 222. *S. C.* 1 Mont. 513.

A bankrupt cannot petition to supersede a commission on the ground of the insufficiency of the petitioning creditor's debt, when he has lain by two years without adopting any proceeding for that purpose.

A petition is not necessarily dismissed with costs, because a previous petition for the same object has been also dismissed, if the dismissal of the prior petition was on a mere matter of form. *Ex parte Hooper, re Hooper*, 1832. 1 Dea. & Chit. 117.

A petition for keeping separate accounts, which might be done under the general order, dismissed with costs. *Ex parte Green, re Holder,* 1832. 1 Dea. & Chit. 382.

Where a creditor does not use due diligence to prove his debt, he is not entitled to petition to stay the bankrupt's certificate, in order to afford him time to do so, with a view to his dissenting from its allowance.

An affidavit by the bankrupt in answer to such a petition, filed two days before the hearing, may be read; but if it makes any charge of delay against the petitioner, which he is anxious to explain, the Court will give him time for that purpose; more especially if the amount of his debt would turn the certificate.

A petition to stay the certificate and expunge a creditor's name from it, who had signed it, on the ground that he had been previously satisfied his debt, must be served on the creditor.

A creditor, by petitioning to stay the certificate, makes his election to come in under the commission for every provable debt which may be owing to him from the bankrupt; and, therefore, the bankrupt must be discharged from any action pending against him by the creditor in respect of any such debt, before the petition can be proceeded in.

The assignees cannot be heard on a petition by an individual creditor to stay the bankrupt's certificate, although they may have been served with the petition. *Ex parte Bostock, re Wright,* 1832. 1 Dea. & Chit. 383.

Period of eight days for which petition was answered, allowed to be enlarged. *Ex parte Beardsworth, re Jones,* 1832. 1 Dea. & Chit. 369.

The Court of Review will not hear the petition of a bankrupt to supersede a fiat until he has surrendered, notwithstanding the petition is presented before the forty-second day, and the petition comes on before the time of surrendering has expired. *Ex parte Drake, re Drake,* 1832. 1 Mont. 486.

PETITION, SERVICE.

A petition to tax a solicitor's bill must be served on the opposite party. *Ex parte Griffith, re Cooper,* 1832. 1 Dea. & Chit. 41. *S.C.* 1 Mont. 517.

On application tending to enforce a party to take the office of assignee upon him against his wish, he must be served with notice of it. *Ex parte Green, re Ridley,* 1832. 1 Dea. & Chit. 487.

Service of petition to supersede by consent. *Re Eastcourt,* 1832. 1 Dea. & Chit. 458.

Petition to stay certificate and ex-

punge creditor's name from it, who had signed it, on the ground that he had been previously paid his debt, must be served on the creditor. *Ex parte Bostock, re Wright*, 1832. 1 Dea. & Chit. 383.

The Court will make no order for proof of a debt, in anticipation of a probable objection that may be made to such proof by the Commissioner. When any application of this nature is made previous to the choice of assignees, the petitioning creditor should be served with the petition. *Ex parte Beaumont, re Duckett*, 1832. 1 Dea. & Chit. 360.

Though appearance of a party is wholly unnecessary, yet if he is served with notice of intended application, he is entitled to his costs of appearance, but not to the costs of unnecessary affidavits filed by him. *Ex parte Reid, re Mills*, 1832. 1 Dea. & Chit. 322.

When a renewed fiat is prayed by a creditor, by reason of the death of commissioners, the assignees must be served with the petition. *Ex parte Ray, re Wilson*, 1832. 1 Dea. & Chit. 341.

Upon a petition by a creditor, under 6 *Geo.* 4. c. 16. s. 14. to re-tax a solicitor's bill, it is not necessary to serve the assignees. *Ex parte Payne, re Saunderson*, 1831. 1 Mont. 455.

Rule as to serving purchaser, on an application to set aside a sale made by assignees. *Ex parte Shepley, re Wright*, 1831. 1 Mont. 353.

PETITION,

Form, Amendment, Attestation, and Signature.

Solicitor allowed to sign petition for petitioner, under circumstances. Order not to be drawn up, but attached to petition. *Ex parte Alexander, re Swainson*, 1832. 1 Dea. & Chit. 532.

Where original petition is filed and affidavits put in, and then petition is amended by adding the name of another party as respondent, those affidavits cannot be read against him. *Ex parte Mascarenas, re Dawson*, 1832. 1 Dea. & Chit. 507.

Form of petition to annul fiat. *Anon.* 1832. 1 Dea. & Chit. 498.

Where petition attested according to *spirit* of General Order, Court will always endeavour to get rid of formal objection by allowing time to amend. *Ex parte Wiggin, re Nicholls*, 1832. 1 Dea. & Chit. 497. *S. C.* 1 Mont. 516.

This Court has no jurisdiction to hear petitions addressed to the Lord Chancellor. *Re Appling*, 1832. 1 Dea. & Chit. 7. *S. C.* 1 Mont. 512.

A creditor petitioning to supersede must not only state that he was a creditor at the time of issuing the commission, but also at the time of presenting his petition. *Ex parte Flight, re Bateman,* 1832. 1 Dea. & Chit. 78.

Informal address of petition. *Anon.* 1832. 1 Dea. & Chit. 281.

Petition to stay certificate and for liberty to prove, should state grounds on which Commissioner rejected the proof, and Court will not give time to amend. *Ex parte Pearse, re Foxwell,* 1832. 1 Dea. & Chit. 574.

Attestation thus, "Witness, J. L. solicitor for the petitioner." J. L. being the country attorney, and petition presented by agent in town: —Held, informal. *Quære tamen, Ex parte Rose, re Rose,* 1832. 1 Dea. & Chit. 554.

Where a joint fiat issues against *A.* and *B.* and the debt is separate, it is void, and the subsequent superseding it as to *A.* cannot make it good as a separate fiat as to *B.* In such case, a petition praying to supersede against *B.* need not state the objection that is relied on. *Ex parte Clarke, re Clarke,* 1832. 1 Dea. & Chit. 544.

Petition to stay certificate and for liberty to prove, should state grounds on which Commissioner rejected the proof, and Court will not give time to amend. *Ex parte Pearse, re Foxwell,* 1832. 1 Dea. & Chit. 574.

Bankrupt residing so far off that before his signature to a petition to enlarge the time (to which he assented) could be obtained, the time for opening the fiat would expire, his solicitor was allowed to sign the petition on his behalf. *Ex parte Craddock, re North,* 1832. 1 Dea. & Chit. 487. *S. C.* 1 Mont. 511.

On a petition by creditors to supersede, if they are styled creditors in title of the petition, there need be no express allegation to that effect. *Ex parte Springett, re Springett,* 1832. 1 Dea. & Chit. 380.

Informal address allowed to be amended and affidavits to be resworn. *Ex parte Meath, re Pearson,* 1832. 1 Mont. 520.

Petition to supersede, and certificate accompanying, of consent, both addressed to the Lord Chancellor, allowed to be amended. *Re Ricard,* 1832. 1 Mont. 507.

Petitioning creditor's presence at opening of fiat, and also his signature to petition, dispensed with, on account of age and illness. *Re Wood,* 1832. 1 Mont. 509.

Parties numerous to petition, allowed good, if signed by one, and attested by solicitor. *Ex parte Vine, re Hooper,* 1832. 1 Mont. 516. *See also Anon. id.* 517.

The attestation of the solicitor to a petition is as a guarantee that the petition is proper, and not a security for costs. *Ex parte Cadby, re Hunter*, 1831. 1 Mont. 352.

The attestation must be to the name of the petitioner, and not to the petition. *Ex parte Cracklow, re Peet*, 1831. 1 Mont. 353.

PETITION OF INSOLVENT.

An insolvent's petition is said to be filed when it reaches its place of final custody, and not when it first comes to the hands of the officer of the Court. *Garlick* v. *Sangster*, 1832. 9 Bing. 46.

PETITION TO SUPERSEDE.

See also SUPERSEDEAS.

On petition to supersede, notice to produce proceedings having been given to the assignees, the absence of such proceedings is not ground for ordering supersedeas *eo instanti*. Petition must stand over at costs of assignees. *Ex parte Clarke, re Withers*, 1832. 1 Dea. & Chit. 548.

A single creditor, who petitions to supersede a commission on the ground of fraud and collusion, must also pray that a new fiat may issue. Or, without petitioning to supersede, he may pray for the removal of the assignees, and for others to be chosen in their room. If his petition is merely to supersede, it will be dismissed with costs. *Ex parte Shum, re Rose*, 1832. 1 Dea. & Chit. 260.

The Court of Review has power to examine the bankrupt *vivâ voce* on his petition to supersede the commission. *Ex parte Palmer, re Palmer*, 1832. 1 Dea. & Chit. 375.

Course of proceeding and rules of evidence on a *vivâ voce* examination of bankrupt's petition to supersede. *Ex parte Palmer, re Palmer*, 1832. 1 Dea. & Chit. 371.

On petition presented to the Lord Chancellor before the 11th January 1832 to supersede, an action at law was directed to try validity of commission, costs reserved: verdict in favour of petitioner. A new petition was thereupon presented to Court of Review and granted:—Held, petitioner was entitled to costs of both petitions, and that Court of Review had no jurisdiction in question whether the petitioning creditor could set off the debt really due to him against those costs. *Ex parte Thomas, re Thomas*, 1832. 1 Dea. & Chit. 443.

PETITION TO STAY CERTIFICATE.

See also ORDER TO STAY—CERTIFICATE STAYING.

Where petition is presented to stay

certificate, and petitioner then withdraws his opposition, an affidavit of no collusion is requisite. *Ex parte Cates, re Jackson,* 1832. 1 Dea. & Chit. 546.

Form of petition to prove and stay certificate. *Ex parte Skipp, re Singleton,* 1832. 1 Dea. & Chit. 497.

PETITIONING CREDITOR.

See OPENING COMMISSION—FIAT—COMMISSION.

A party who has been discharged twice under an InsolventAct, and is afterwards bankrupt, and not paid 15*s.* in the pound, cannot have property, and therefore cannot be petitioning creditor. *Ex parte Mascarenas, re Dawson,* 1832. 1 Dea. & Chit. 507.

The circumstance of a petitioning creditor residing at a distance of 85 miles from the place where the fiat is to be opened, is not of itself a sufficient reason for dispensing with his personal attendance before the Commissioners to prove his debt. *Ex parte Cox,* 1832. 1 Dea. & Chit. 205. *S. C.* 1 Mont. 390.

Personal attendance of petitioning creditor at opening of commission 200 miles off, dispensed with, on ground of personal inconvenience. *Ex parte Ross, re Kirby,* 1832. 1 Dea. & Chit. 552.

The Court will not make an order for proof of a debt in anticipation of a probable objection that may be made to such proof by the Commissioner. When any application of this nature is made previous to the choice of assignees, the petitioning creditor should be served with the petition. *Ex parte Beaumont, re Duckett,* 1832. 1 Dea. & Chit. 360.

Petitioning creditor's presence at opening fiat dispensed with on account of age and illness; and signature of the petition dispensed with also. *Re Wood,* 1832. 1 Mont. 509.

Whether, on an indictment against a bankrupt for concealing his effects, the petitioning creditor is a competent witness to prove the petitioning creditor's debt. *Quære. Rex* v. *Walters,* 1831. 5 Car. & P. 138.

PETITIONING CREDITOR'S DEBT.

A commission of bankrupt may be supported on a debt accruing before the bankrupt became a trader, and an act of bankruptcy committed after he has ceased to be a trader. *Bailie* v. *Grant,* 1832. 9 Bing. 121.

Whether, on an indictment against a bankrupt for concealing his effects, the petitioning creditor is a competent witness to prove the petitioning creditor's debt. *Quære.* *Rex* v. *Walters*, 1831. 5 Car. & P. 138.

PLEADING.

See PETITION, FORM OF.

PRACTICE.

See the particular titles throughout.

Where petition to supersede was presented to the Lord Chancellor before 11th January 1832, in order to save expense of new petition, service of motion on assignees that prayer of petition may be granted by C. R. sufficient. *Ex parte Embden, re Embden*, 1832. 1 Dea. & Chit. 461. *S. C.* 1 Mont. 518.

Contrary to the old practice, the Court will not, in general, refer it to the Commissioner to ascertain the existence of an equitable mortgage, but will themselves decide the question. *Ex parte Smith, re Harrison*, 1832. 1 Dea. & Chit. 441. *S. C.* 1 Mont. 514.

Motion to postpone petition in paper of the day, heard in precedence of paper though opposed. *Ex parte Clarke, re Sewerkrop*, 1832. 1 Dea. & Chit. 452.

PRINCIPAL AND SURETY.

A. guaranteed the payment of goods to be supplied by *B.* to *C.* *C.* became bankrupt, and *B.* proved under his commission, and afterwards signed his certificate, although *A.* gave him notice not to do so:— Held, nevertheless, *A.* was not discharged from his liability as surety, as it was his duty to have paid the debt due from *C.* to *B.*; but as he neglected to do so, and permitted *B.* to prove under *C.*'s commission, *B.*'s signing the certificate was not such an act as to alter *A.*'s right without his control or consent, as he might have paid the debt in due time, and thereby prevented *B.* from proving under the commission. *Browne* v. *Carr*, 1831. 5 Moore & P. 497.

PROMISSORY NOTE.

A promissory note payable to "*A. B.* or order, on demand," is not a note payable to the bearer on demand, and is consequently within the second class of notes in the first schedule of the Stamp Act, which are chargeable with the lower duty. *Ex parte Robinson, re Rastall*, 1832. 1 Dea. & Chit. 275.

PROOF.

One of three executors becoming bankrupt, the two others may prove against his estate. *Ex parte Brown*, 1832. 1 Dea. & Chit. 118.

A bankrupt covenanted by his marriage settlement, that his heirs,

executors, &c. should, within twelve calendar months after his decease, pay 4000*l.* to trustees, upon trust to pay the interest to his intended wife for her life; and after her death then to pay the principal sum to the children of the marriage; and if no children, to the wife if she survived her husband: but if not, then to the executors of the husband:—Held, that this covenant constituted a debt contracted by the bankrupt, payable on a contingency, and capable of valuation; and therefore provable within the 56th sec. of the 6 *Geo.* 4. c. 16. *Ex parte Tindal, re Gibbins*, 1832. 1 Dea. & Chit. 291. *S. C.* 1 Mont. 375, 462. 8 Bing. 402.

Where a bankrupt, in consideration of his wife's fortune, gave a bond to trustees to pay them 3000*l.* of which, by the terms of a settlement, it was declared that the bankrupt should be entitled to the interest during his life, and after his death the principal was to go to his wife; and the bankrupt made default in the payment of his money:—Held, that the trustees might prove for 3000*l.*, and that the interest upon the dividends to be received under such proof should accumulate until the 3000*l.* should be realized; after which, but not before, the interest might be paid to the assignees for the benefit of the creditors. *Ex parte Turpin, re Brown*, 1832. 1 Dea. & Chit. 120. *S. C.* 1 Mont. 443.

A joint creditor takes an equitable mortgage from one of two partners, as a security for his debt; after which that partner dies and the other becomes bankrupt:—Held, that the creditor might prove the amount of his debt, without the previous sale of his security. *Ex parte Bowden, re Brettell*, 1832. 1 Dea. & Chit. 135.

An equitable mortgagee of one partner, for a debt due from the other, may prove his whole debt against the separate estate of that other partner, and retain his security against the first.

Where a petition to prove is unnecessary, the petitioner is liable to costs. *Ex parte Rodgers, re Parkin*, 1832. 1 Dea. & Chit. 38.

Where a bankrupt trustee had suffered the trust found to be misappropriated, the Court directed that the son of the *cestui que trust* might prove for the amount, retaining the dividends till further order. *Ex parte Vine, re Hooper*, 1832. 1 Dea. & Chit. 357.

The Court will make no order for proof of a debt, in anticipation of a probable objection that may be made to such proof by the Commissioner. When any application of this nature is made previous to the choice of assignees, the petitioning creditor should be served with the petition. *Ex parte Beaumont*,

re Duckett, 1832. 1 Dea. & Chit. 360.

On one petition by the assignees, ordered that the respective agents of several societies be allowed to tender proof of their respective debts before Commissioner, but not to have any power over certificate or in choice of assignees. *Ex parte Ellis, re Duckett*, 1832. 1 Dea. & Chit. 463.

Where a creditor petitions to prove a debt which is not in its nature provable, the petition will be dismissed with costs, notwithstanding the Commissioners rejected the proof for an insufficient reason. *Ex parte Worthington, re Marsh*, 1832. 1 Dea. & Chit. 288.

This Court will not expunge a proof merely because the creditor has instituted process in a foreign country for the recovery of his debt, in the absence of all evidence as to the nature of the process abroad. *Ex parte Cotesworth, re Vanzeller*, 1832. 1 Dea. & Chit. 281.

Where the contingency depends upon the separation of husband and wife, and of a widow's not marrying, it is not within section 56. *Ex parte Davis, re Wentworth*, 1831. 1 Mont. 297.

Traders in copartnership having admitted a dormant partner, his share in the joint stock is in the order and disposition of the ostensible partners, and distributable as such; but the creditors of the new firm and creditors of the old firm, who had notice that a dormant partner had been admitted, are entitled to prove their debts *pari passu* with the other creditors of the old firm. *Ex parte Chuck, re Starkey*, 1832. 1 Mont. 457. *S.C.* 8 Bing. 469.

Plaintiff having proved under a commission of bankrupt, in 1816:—Held, estopped to sue for the same debt after the passing of 6 *Geo.* 4. c. 16. though that statute repeals 49 *Geo.* 3. c. 121., which makes proof of a debt an election not to sue. *Adames* v. *Bridger*, 1832. 8 Bing. 314.

H. before his bankruptcy hired a carriage of *M.*, and let it to defendant; defendant sent it back to *H.* damaged; *M.* repaired it with the assent of *H.*, and *H.* having become bankrupt, proved the amount due for repairs under *H.*'s commission:—Held, that *H.*'s assignees had a right of action against the defendant, although *H.*'s estate paid no dividend. *Porter* v. *Vorley*, 1832. 9 Bing. 93.

A mortgagee petitioned for the sale of his security, and to be permitted to prove the full amount of his debt in a suit for the administration of the assets of the deceased mortgagor:—Held, that he could prove only for so much of his debt as

might remain unpaid by the produce of the mortgaged estate, according to the rule in bankruptcy. *Greenwood* v. *Taylor*, 1830. 1 Russ. & M. 185.

After a commission of bankruptcy was sued out against the plaintiff, the defendant signed judgment as in case of a nonsuit, taxed the costs, and sued out execution. The first day of the term, to which the judgment related, was before the commission was issued: — Held, that the costs were not provable under the commission, as they did not constitute a debt till judgment was actually signed; and that, although the plaintiff had obtained his certificate, he was still liable for such costs. *Brough* v. *Adcock*, 1831. 5 Moore & P. 678.

PROVISIONAL ASSIGNEES.

See also ASSIGNEE.

The provisional assignee of a bankrupt is not responsible for the fraud of an agent appointed with due care. *Raw* v. *Cutten*, 1832. 9 Bing. 96.

PURCHASER.

The Court will not order the bargain and sale from the Commissioners to the assignees to be given by them to a purchaser, upon his allegation, merely that the bankrupt had no other freehold property than what was conveyed to the purchaser under the commission. *Ex parte Pocock, re Chapman*, 1832. 1 Dea. & Chit. 104.

The 1 & 2 *Will.* 4. c. 56. s. 27. does not require the certificate of the appointment of assignees to be registered, in order to protect them against subsequent purchasers of bankrupt's freehold property without notice, unless the property is in a register county. *Anon.* 1832. 1 Dea. & Chit. 349.

REFERENCE.

The Court will not order resolutions passed at a meeting of creditors to be carried into effect, without referring it to the Commissioners to certify whether it would be for the benefit of the estate. *Ex parte Farmer, re Statham*, 1832. 1 Dea. & Chit. 110.

Where a creditor alleges there has been a fraudulent preference, the Court will, on his petition, send the case for inquiry before the Commissioners, the creditor undertaking to pay the costs of such inquiry. *Ex parte Billing, re Lucas*, 1832. 1 Dea. & Chit. 112.

When a matter may be referred to a judge. *Ex parte Jeffery, re Twort*, 1832. 1 Dea. & Chit. 206.

Contrary to the old practice, the Court will not, in general, refer it to the Commissioner to ascertain

the existence of an equitable mortgage, but will themselves decide the question. *Ex parte Smith, re Harrison*, 1832. 1 Dea. & Chit. 441. *S.C.* 1 Mont. 514.

Court will not sanction a sale of bankrupt's property by private contract, without previous reference to the Commissioners. *Ex parte Goding, re Easling*, 1832. 1 Dea. & Chit. 323.

REGISTRATION.

The want of registration of a conveyance invalidates the deed as to subsequent purchasers only, not as to assignees of the party conveying property. *Ex parte Coles, re Rucker*, 1832. 1 Dea. & Chit. 100.

The 1 & 2 *Will.* 4. c. 56. s. 27. does not require the certificate of the appointment of assignees to be registered, in order to protect them against subsequent purchasers of bankrupt's freehold property without notice, unless the property is in a register county. *Anon.* 1832. 1 Dea. & Chit. 349.

REHEARING.

A petition cannot be reheard, unless the order made on the former hearing is drawn up. *Ex parte Jenkins, re Nokes*, 1832. 1 Dea. & Chit. 222. *S.C.* 1 Mont. 513.

RENEWED FIAT.

See also FIAT.

When renewed fiat is prayed by creditor, by reason of death of Commissioner, the assignees must be served with petition. *Ex parte Ray, reWilson*, 1832. 1 Dea. & Chit. 341.

REPORT.

Leave to except to the report of an officer of this Court need not be applied for. *Ex parte Crockwell, re Crockwell*, 1832. 1 Dea. & Chit. 546.

An order made for taxation, and one-sixth taxed off, solicitor applying to confirm and giving notice to petitioner, must pay costs of petitioner's appearance on such application, and also costs of petition and of taxation. *Ex parte Nutting, re Shepherd*, 1832. 1 Dea. & Chit. 551.

REPUTED OWNERSHIP.

See also SHORT BILLS.

The custom at the London Docks is to acknowledge no title in wines unless accompanied with possession of dock warrants indorsed by the party to whom they originally issued. Where *A.* received warrants from *B.* not indorsed by *B.*, and *A.* delivered and indorsed them to *C.*, who afterwards procured *B.*'s indorsement, and *A.* became bankrupt : — Held, the wines passed to *C.*, though notice of transfer to dock company, and indorsement by *B.*, were subsequent to the bankruptcy :—Held, also, that for want of *B.*'s indorsement to *A.*, and transfer into *A.*'s name

in the company's books, *A.* never had the order and disposition of them. *Ex parte Davenport, re Leach*, 1832. 1 Dea. & Chit. 397.

Where a company is formed by act of parliament for the purchase of lands to make a canal, and the act declares that the shares "shall be deemed personal estate, and shall be transmissible as such:"—Held, that though the profits arose out of land, the shares were personal property, passing as such to the assignees on the bankruptcy of a proprietor.

Where an act prescribes certain forms in the transfer of such shares: Held, unless they are strictly complied with, the shares remain in the order and disposition of the bankrupt proprietor, the ordinary mode of transfer not constituting an equitable mortgage. And though the act only expressly relates to transfers between third parties, yet it impliedly relates to cases where the company are the transferees. *Ex parte Lancaster Canal Company, re Dilworth*, 1832. 1 Dea. & Chit. 411.

Quære. Whether fixtures are within the 72d section of the Bankrupt Act. *Ex parte Austin, re King*, 1832. 1 Dea. & Chit. 207.

A landlord distrained for rent in arrear before the bankruptcy of his tenant, and when the goods were appraised left them on the premises for the use of the bankrupt's wife, the bankrupt himself being in prison. After the bankruptcy, the landlord distrained again for the very same arrears of rent:—Held, that the second distress was void, and that the goods passed to the assignees, as being in the order and disposition of the bankrupt at the time of his bankruptcy. *Ex parte Bradley, re Deane*, 1832. 1 Dea. & Chit. 223.

Traders in copartnership having admitted a dormant partner, his share in the joint stock is in the order and disposition of the ostensible partners, and distributable as such; but the creditors of the new firm and creditors of the old firm, who had notice that a dormant partner had been admitted, are entitled to prove their debts *pari passu* with the other creditors of the old firm. *Ex parte Chuck, re Starkey*, 1832. 1 Mont. 457. *S. C.* 8 Bing. 469.

RESOLUTIONS OF CREDITORS.

The Court will not order resolutions passed at a meeting of creditors to be carried into effect, without referring it to the Commissioners to certify whether it would be for the benefit of the estates. *Ex parte Farmer, re Statham*, 1832. 1 Dea. & Chit. 110.

Creditors having, subsequent to the appointment, signed resolutions authorizing the assignees to do certain acts, as assignees, which they could not have performed without such authority, and to act generally as assignees, are debarred from

questioning the validity of the appointment at a subsequent period, upon grounds of which they were aware at the time of signature. *Ex parte Nash, re Wyatt*, 1832. 1 Dea. & Chit. 445.

SALE.

See also EQUITABLE MORTGAGE—MORTGAGE—SECURITY.

When mortgaged property is sold, and the same solicitor is concerned for the assignees and the mortgagees, a separate solicitor should be appointed for the purposes of the sale. *Ex parte Rolfe, re Johnson*, 1832. 1 Dea. & Chit. 77.

Where an equitable mortgagee, with a power of sale, had executed the power by putting up the estate to sale, when it was sold to him for 300*l.* and he applied afterwards for the usual order:—Held, that the estate must be put up at that sum. *Ex parte Francis, re Brown*, 1832. 1 Dea. & Chit. 274.

Where deeds relating to freehold and leasehold property were deposited with an equitable mortgagee, but the memorandums accompanying the deposit merely related to the leasehold property:—Held, that the mortgagee might nevertheless pray a sale of the freehold as well as the leasehold property, subject however to the payment of the costs of the sale. *Ex parte Robinson, re Evans*, 1832. 1 Dea. &. Chit. 119.

Where an application for sale of equitable mortgage and liberty to bid, one mortgagee being also an assignee, separate solicitor must be appointed for the sale, and assignees not to have conduct of it. *Ex parte Greenwood, re Joy*, 1832. 1 Dea. & Chit. 542.

The Court will not sanction a sale of the bankrupt's property by private contract, without a previous reference to the Commissioners. *Ex parte Goding, re Easling*, 1832. 1 Dea. & Chit. 323.

Where equitable mortgagee of leasehold property applied for sale, the Court refused to order him to indemnify the assignees against any breach of covenants in the lease, but gave assignees time to reject or accept the lease. *Ex parte Fletcher, re Collins*, 1832. 1 Dea. & Chit. 318.

Rule as to serving purchaser, on an application to set aside a sale made by assignees. *Ex parte Shipley, re Wright*, 1831. 1 Mont. 353.

The General Order 8 March 1794 does not authorize the Commissioners to order a sale of an estate on which an annuity is charged, for payment of the value of the annuity. *Re Delves*, 1831. 1 Mont. 492.

The Court will not, before hearing of petition, decide whether impertinent matter exist in affidavits: Court came to the same determination in *Ex parte Arnsby, re Lord*, 7 November 1832. Mr. *Wright* applied: but *secus* as to scandalous matter. *Ex parte Williamson, re Williamson*, 1832. 1 Dea. & Chit. 529.

SECOND COMMISSION.

Defendant took goods under a second commission of bankrupt, while a former commission was subsisting: —Held, they could not retain them, even against a colourable title, the second commission being void. *Nelson* v. *Cherrill*, 1832. 8 Bing. 316. *S. C.* 5 Moore & P. 680.

SECRETARY OF BANKRUPTS.

The Secretary of Bankrupts is no officer of the Court of Review, but of the Lord Chancellor. *Re Fly*, 1832. 1 Dea. & Chit. 249.

The Court of Review has no direct power over the Secretary of Bankrupts, who is an officer of the Lord Chancellor, and not of this Court. *Anon.* 1832. 1 Dea. & Chit. 359.

Secretary of Bankrupts not officer of Court, but *leave* given that he should attend trial with papers. *Re Whitfield*, 1832. 1 Mont. 513.

SECURITY.

See also SALE.—EQUITABLE MORTGAGE.

An equitable mortgagee of one partner, for a debt due from the other, may prove his whole debt against the separate estate of that other partner, and retain his security against the first.

Where a petition to prove is unnecessary, the petitioner is liable to costs. *Ex parte Rodgers, re Parkin*, 1832. 1 Dea. & Chit. 38.

A joint creditor takes an equitable mortgage from one of two partners, as a security for his debt; after which that partner dies and the other becomes bankrupt:—Held, that the creditor might prove the amount of his debt without the previous sale of his security. *Ex parte Bowden, re Brettell*, 1832. 1 Dea. & Chit. 135.

If bills amounting to 1320*l.* be delivered by the drawer to the creditor as collateral security for a debt of 4000*l.*, and the drawer and acceptor become bankrupt, but the estate of the acceptor prove solvent, the creditor is entitled to receive 20*s.* in the pound on the bills against the estate of the acceptor, and also prove the debt of 4000*l.* and receive dividends in liquidation of the remaining portion of his debt under the commission against the drawer. *Ex parte Sammon, re Peirson*, 1832. 1 Dea. & Chit. 564.

Where deeds were deposited for securing 150*l.* to be advanced in cash by discounting bills, and 150*l.* in goods: — Held, the security could not be extended to 162*l.* in cash advanced (the additional 12*l.* being for interest and stamps on a renewed bill), although only 63*l.* was advanced in goods: but must be limited to the 150*l.* in cash and 63*l.* in goods. *Ex parte Hannen, re Transfield*, 1832. 1 Dea. & Chit. 407.

SERVICE.

See PETITION, SERVICE.

SET OFF.

A petition presented to Lord Chancellor before 11th January 1832, to supersede, an action at law was directed to try the validity of commission, costs reserved. Verdict in favour of petitioner. A new petition was thereupon presented to the Court of Review and granted :—Held, petitioner was entitled to costs of both petitions, and that C. R. had no jurisdiction in question, whether the petitioning creditor could set off the debt really due to him against those costs. *Ex parte Thomas, re Thomas,* 1832. 1 Dea. & Chit. 443.

Assumpsit by the assignees of *R.*, a bankrupt, on a promissory note drawn by defendant, payable to *G.* or order, and by him indorsed to the bankrupt before the bankruptcy. It appeared that in October 1825, *G.* applied to the bankrupt to discount the note, and took, as part of the proceeds, a bill of exchange, accepted by the bankrupt, payable to *G.*'s order. *G.* indorsed this bill for value to the defendant, and he got it discounted by *H.*, who was the holder when it became due. A commission of bankrupt issued against *R.* on the 23d December, and the bill became due on the 24th, when it was presented and dishonoured. On the 26th *H.* received the amount from the defendant, and returned the bill to him:—Held, that he had a right to set off the bill against the demand of the assignees on the promissory note. *Collins* v. *Jones,* 1830. 10 B. & C. 777.

SHERIFF.

The sheriff sold goods under a *fi. fa.*, without notice of a previous act of bankruptcy by the defendant, and paid over the proceeds of the sale to the plaintiff upon an indemnity :—Held, that the defendant's assignee might properly sue the sheriff, in an action for money had and received. *Young* v. *Marshall,* 8 Bing. 43. *S.C.* 6 Moore & P. 110.

Goods were seized and sold under a *fi. fa.* by a chief bailiff of a franchise, having sole execution of writs therein, after an act of bankruptcy committed by the defendant, but without knowledge thereof, and before the commission issued :—Held, that trover would not lie by the assignees against the chief bailiff, though the property in the goods vested in them by relation to the act of bankruptcy. *Secus* as to the deputy bailiff, who had taken indemnity from the judgment creditors. *Balm* v. *Hutton,* 1831. 2 Tyrwhitt, 17. *S. C.* 2 Cromp. & J. 19.

SHORT BILLS.

A. was in the habit of indorsing and paying into his country banker, *B.*'s

hands, bills not due, which were entered by *B.* in the pay-book as bills to his credit to the full amount. By the custom of the bank the customers were at liberty to draw for the amount of such bills immediately, and the bank was at liberty to pay away such bills as they thought fit. There was no evidence of *A.*'s knowledge of this custom, and *A.* swore that he never gave authority to *B.* to negociate them, but deposited them only that *B.* might receive the value of them when at maturity; that he never drew on account of any bill till after it was due; that the balance of accounts, independent of the bills, was always in his favour, and that he never received more than one such bill, (deposited by another customer) in answer to his cheques. *B.* having negotiated them to *C.* as security for a debt, and *B.* becoming bankrupt before the bills were due:—Held, that they did not pass to *B.*'s assignees, and, therefore, *A.* was entitled to be indemnified from the surplus security in the hands of *C.* *Ex parte Benson, re Dilworth,* 1832. 1 Dea. & Chit. 435.

SOLICITOR.

A bankrupt having employed *A.*, a solicitor, to procure signatures of creditors to his certificate, and then ceased to employ him, cannot oblige his, *A.*'s, clerk to make affidavit of witnessing the signatures without first paying *A.* his costs for such business. *Ex parte Shore, re Lucas,* 1832. 1 Dea. & Chit. 509.

An attorney, unable from bodily infirmity to attend to be sworn in, was allowed to be admitted on an affidavit sworn before a Master in Chancery. *Ex parte Swain,* 1832. 1 Dea. & Chit. 15.

Upon a petition by a creditor, under 6 *Geo.* 4. c. 16. s. 14., to retax a solicitor's bill, it is not necessary to serve the assignees. *Ex parte Payne, re Saunderson,* 1831. 1 Mont. 455.

STAMP.

A promissory note payable to "*A. B.* or order, on demand," is not a note payable to the bearer on demand, and is, consequently, within the second class of notes in the first schedule of the Stamp Act, which are chargeable with the lower duty. *Ex parte Robinson, re Rastall,* 1832. 1 Dea. & Chit. 275.

STATUTES.

1 & 2 *Will.* 4. c. 56. Appendix i.
2 & 3 *Will.* 4. c. 14. lviii.
2 *Will.* 4. c. 53. s. 39. lxiii.

STATUTE OF LIMITATIONS.

In 1806 *P.* proves a debt against the estate of *B.* & Co. bankrupts, on a bill of exchange, and dies in 1807, appointing *G.* his executor; *G.*

becomes bankrupt in 1816, and obtains his certificate in 1817: but before that time, viz. in the years 1811, 1814, 1815, *G.* had, as executor, received three dividends on *P.*'s debt, and after his certificate in 1817, 1822, and 1828, he receives three other dividends; it afterwards turns out that the bill of exchange was paid by another party in 1807, so that no dividend was ever due.

On petition by *B.* & Co.'s assignees to expunge the proof, and that *G.* should refund the six dividends:—Held, first, that it being in the nature of a trust the statute of limitations did not run in favour of *G.* But second, that as the first three dividends were paid in error, and were a legal debt against *G.* and might have been proved under his bankruptcy, the claim as to them was barred by *G.*'s certificate. The other three, received since his bankruptcy, were ordered to be refunded. *Ex parte Bolton, re Baillie*, 1832. 1 Dea. & Chit. 556.

A surviving assignee is liable for the payment of dividends, if his co-assignee ever admitted the proof of the debt, although the creditor has failed to apply for the dividends for many years, unless it can be proved that the creditor has received them; the onus of the proof of payment lying on the assignee, and this, notwithstanding there is no sufficient fund left of the bankrupt's estate pay to the creditor. The statute of limitations does not attach to a debt proved under a commission or fiat of bankruptcy. *Ex parte Healey, re Norris*, 1832. 1 Dea. & Chit. 361.

STATUTE, CONSTRUCTION OF 6 GEO. 4. c. 16.

See also OPERATION OF 6 GEO. 4. c. 16—PAYMENTS PROTECTED.

Sec. 8. *W.* & *T.* arrested *M.* & *S.* for debt, and shortly afterwards issued a commission of bankruptcy against them; but, after proving their debt, abandoned the commission, in order to proceed against the bail in the action. They then obtained the joint note of *H.* (one of the bail) and of *M.* & *S.*, and compelled *H.* to pay the note; soon after which a second commission issued against *S.* as surviving partner of *M.* After giving this note, the bail took an assignment from *M.* & *S.* of all their stock in trade, &c. as an indemnity against the consequences of becoming bail:—Held, that none of these circumstances operated as a forfeiture of the debt of *W.* & *T.* within the meaning of the 8th section of 6 *Geo.* 4. c. 16:—Held, also, that *M.* having died before adjudication under the first commission, that commission became null and void, without any writ of supersedeas. *Quære*, Whether in case of such a forfeiture of the debt by the petitioning creditor, this Court can order him to pay over the amount

to the assignees. *Ex parte Green, re Madders*, 1832. 1 Dea. & Chit. 230.

Sec. 56. A bankrupt covenanted by his marriage settlement, that his heirs, executors, &c. should, within twelve months after his decease, pay 4000*l.* to trustees, upon trust to pay the interest to his intended wife for her life; and after her death then to pay the principal sum to the children of the marriage; and if no children, to the wife, if she survived her husband; but if not, then to the executors of the husband:—Held, that this covenant constituted a debt contracted by the bankrupt, payable on a contingency, and capable of valuation; and therefore provable within the 56th section 6 *Geo.* 4. c. 16. *Ex parte Tindal, re Gibbins*, 1832. 1 Dea. & Chit. 291. *S. C.* 1 Mont. 375, 462; 8 Bing. 402.

Sec. 59. Plaintiff having proved under a commission of bankrupt in 1816:—Held, estopped to sue for the same debt after the passing of 6 *Geo.* 4. c. 16. though that statute repeals 49 *Geo.* 3. c. 121. which makes proof of a debt an election not to sue. *Adames* v. *Bridger*, 1832. 8 Bing. 314.

Sec. 75. Covenant for rent. Plea, that before the rent became due, the defendants, by deed, assigned all their interest in the demised premises to *A. B.*, subject to the payment of the rent and performance of the covenants contained in the lease; and that he, by the assignment, covenanted to pay the rent and perform the covenants contained in the lease; that the defendants delivered the lease to him, and he accepted the same, and entered on the premises by virtue of the assignment: the plea then stated, that *A. B.* became bankrupt, and that the arrears of rent accrued after the date of the commission; that the assignee of his estate declined the lease, and that the bankrupt, within fourteen days after notice of that fact, delivered up such lease to the plaintiffs, devisees of the reversions:—Held, upon demurrer, that the plea was bad, inasmuch as the statute 6 *Geo.* 4. c. 16. s. 75. did not put an end to the lease, but merely discharged the bankrupt from any subsequent payment of the rent or observance of the covenants. *Manning* v. *Flight*, 1832. 3 Barn. & Adol. 211.

Sec. 82. A trader, in a state of insolvency, and concealing himself from his general creditors, after a secret act of bankruptcy, in part payment of a debt delivered a bill of exchange to a creditor who was acquainted with his place of retreat, and with whom he was in friendly communication:—Held, that this was not a payment protected by the 82nd section of the statute 6 *Geo.* 4. c. 16. *Bagnall* v. *Andrews*, 1830. 4 Moore & P. 839.

Sec. 92, 94. Depositions taken before

commissioners of bankrupt are conclusive evidence of the bankruptcy under 6th *Geo.* 4. c. 16. s. 92. though the conversion for which the assignees proved shall have taken place after the act of bankruptcy; for the bankrupt might have sustained an action up to the time of issuing a commission, and if after that event the assignees should recover, payments to them by the defendant would be protected by s. 94, in case the commission should be afterwards superseded. *Fox* v. *Mahony*, 1831. 2 Tyrwhitt, 285. *S.C.* 2 Cromp. & J. 325.

Sec. 104. The charge of 20*l.* per cent. imposed on assignees by 6 *Geo.* 4. c. 16. s. 104. for retaining the bankrupt's money in their hands, the bankrupt himself has no legal or equitable claim to, either in respect of his allowance or his right to the surplus. *Pell*, J. dissent. *Quære*, Whether this charge is to be 20*l.* per cent. per annum during the whole period of retention, or only one single charge of 20*l.* per cent. upon the gross sum retained. *Quære*, Whether the charge can be sustained on monies retained by assignees previous to the 1st of September, 1825, when the 6 *Geo.* 4. c. 16. first came into operation. *Ex parte Lowe, re Aaron*, 1832. 1 Dea. & Chit. 137. *S. C.* 1 Mont. 392.

Sec. 126. The defendant having become bankrupt and obtained his certificate, the Court may stay the proceedings in the action before judgment, although the 126 sect. of the statute 6 *Geo.* 4. c. 16. only authorizes the Court to discharge a bankrupt taken in execution; but the defendant having created unnecessary expense and delay to the plaintiff, he was required to pay all the costs incurred from the day the cause might have been tried, to the time of the application to stay the proceedings. *Sadler* v. *Cleaver*, 1831. 5 Moore & P. 706.

1 & 2 *Will.* 4. c. 56. *See also* ASSIGNEES, CHOICE, &c.

Sec. 17. Under the 1 & 2 *Will.* 4. c. 56. s. 17. a bankrupt cannot proceed on a petition to supersede in this Court and also have an issue at law; he must elect his remedy: and petition being part heard, he is precluded from an issue. *Ex parte Williamson, re Williamson*, 1832. 1 Dea. & Chit. 549.

Sec. 17. Bankrupt is not precluded by 1 & 2 *Will.* 4. c. 56. s. 17. from applying to supersede, although two months have elapsed from date of adjudication. *Ex parte Palmer, re Palmer*, 1832. 1 Dea. & Chit. 341. *S. C.* 1 Mont. 497.

Sec. 38. The Court has power, under 1 & 2 *Will.* 4. c. 56. s. 38. after hearing a case partly by affidavit, to exa-

mine *vivâ voce* parties who have made affidavits. *Ex parte Palmer, re Palmer,* 1832. 1 Dea. & Chit. 341. *S.C.* 1 Mont. 497.

STAYING PROCEEDINGS.

The defendant having become bankrupt, and obtained his certificate, the Court may stay the proceedings in the action before judgment, although the 126th section of the statute 6 *Geo.* 4. c. 16. only authorizes the Court to discharge a bankrupt taken in execution; but the defendant having created unnecessary expense and delay to the plaintiff, he was required to pay all the costs incurred, from the day the cause might have been tried to the time of the application to stay the proceedings. *Sadler* v. *Cleaver,* 1831. 5 Moore & P. 706.

SUPERSEDEAS.

See also PETITION TO SUPERSEDE.

A bankrupt is not prevented, by the 17th sect. of 1 & 2 *Will.* 4. c. 56. from applying to supersede, although two months have elapsed from the date of the adjudication. *Ex parte Palmer, re Palmer.* 1 Dea. & Chit. 341. *S.C.* 1 Mont. 497.

Course of proceeding and rules of evidence on a *vivâ voce* examination of bankrupt's petition to supersede. *Ex parte Palmer, re Palmer,* 1832. 1 Dea. & Chit. 371.

A petition presented to Lord Chancellor before 11th January 1832, to supersede, an action at law was directed to try validity of commission, costs reserved. Verdict in favour of petitioner. A new petition was thereupon presented to the Court of Review and granted: —Held, petitioner was entitled to costs of both petitions, and that C. R. had no jurisdiction in question, whether the petitioning creditor could set off the debt really due to him against those costs. *Ex parte Thomas, re Thomas,* 1832. 1 Dea. & Chit. 443.

Taking allowance under commission does not preclude an application by bankrupt to supersede. *Ex parte Giles, re Giles,* 1832. 1 Dea. & Chit. 548.

Where a joint fiat issues against *A.* and *B.*, and the debt is separate, it is void, and the subsequent superseding it as to *A.* cannot make it good as a separate fiat as to *B.* In such case a petition praying to supersede against *B.* need not state the objection that is relied on. *Ex parte Clarke, re Clarke,* 1832. 1 Dea. & Chit. 544.

A bankrupt cannot petition to supersede a commission on the ground of the insufficiency of the petition-

ing creditor's debt, when he has lain by two years without adopting any proceedings for that purpose. A petition is not necessarily dismissed with costs, because a previous petition for the same object has been also dismissed, if the dismissal of the prior petition was on a mere matter of form. *Ex parte Hooper, re Hooper*, 1832. 1 Dea. & Chit. 117.

A single creditor who petitions to supersede a commission on the ground of fraud and collusion, must also pray that a new fiat may issue, or without petitioning to supersede, he may pray for the removal of the assignees, and for others to be chosen in their room. If his petition is merely to supersede, it will be dismissed with costs. *Ex parte Shum, re Rose*, 1832. 1 Dea. & Chit. 260.

A creditor petitioning to supersede, must not only state that he was a creditor at the time of issuing the commission, but also at the time of presenting his petition. *Ex parte Flight, re Bateman*, 1832. 1 Dea. & Chit. 78.

W. & *T.* arrested *M.* & *S.* for debt, and shortly afterwards issued a commission of bankruptcy against them, but after proving their debt, abandoned the commission, in order to proceed against the bail in the action. They then obtained the joint note of *H.*, one of the bail, and of *M.* and *S.*, and compelled *H.* to pay the note, soon after which a second commission issued against *S.* as surviving partner of *M.* After giving this note the bail took an assignment from *M.* and *S.* of all their stock in trade, &c. as an indemnity against the consequences of becoming bail: —Held, that none of these circumstances operated as a forfeiture of the debt of *W.* and *T.* within the meaning of the 8th sec. of 6 *Geo.* 4. c. 16. —Held also, that *M.* having died before adjudication under the first commission, that commission became null and void, without any writ of supersedeas. *Quere*, Whether, in case of such a forfeiture of the debt by the petitioning creditor, this Court can order him to pay over the amount to the assignees. *Ex parte Green, re Madder*, 1832. 1 Dea. & Chit. 230.

Order for supersedeas under the composition contract. *Ex parte Osborne*, 1832. 1 Dea. & Chit. 37.

Form of petition to annul fiat. *Anonymous*, 1832. 1 Dea. & Chit. 498.

SURPLUS.

See also BANKRUPT.

When there is a surplus upon the estate of three, which is indebted to two, the creditors of the three are entitled to interest before the

surplus is carried to the estate of the two. *Ex parte Ogle, re Hurst*, 1 Mont. 350.

SURRENDER.

See also ENLARGEMENT OF TIME.

The Court of Review will not hear the petition of a bankrupt to supersede a fiat until he has surrendered, notwithstanding the petition is presented before the forty-second day, and the petition comes on before the time of surrendering has expired. *Ex parte Drake, re Drake*, 1832. 1 Mont. 486.

TAXATION.

See also COSTS.

A petition to tax a solicitor's bill must be served on the opposite party. *Ex parte Griffith, re Cooper*, 1832. 1 Dea. & Chit. 41. *S.C.* 1 Mont. 517.

Upon a petition by a creditor, under 6 *Geo.* 4. c. 16. s. 14., to retax a solicitor's bill, it is not necessary to serve the assignees. *Ex parte Payne, re Saunderson*, 1831. 1 Mont. 455.

THIRD MEETING.

If the barristers in a country commission are absent, an order may be obtained for the others to hold the third meeting. *Ex parte James, re Hughes*, 1832. 1 Mont. 454.

TIME.

See also ENLARGEMENT OF TIME—STATUTE OF LIMITATIONS.

Where a petitioner's affidavits were only filed the day before the petition was appointed to be heard, the Court ordered it to stand over, that the respondent might answer the affidavits. *Ex parte Billing, re Lucas & Shore*, 1832. 1 Dea. & Chit. 42.

Affidavit by bankrupt in answer to petition to stay certificate and prove, filed two days before hearing, may be read, but if it makes any charge of delay against petitioner, which he wishes to explain, Court will give him time for that purpose; more especially if the amount of his debts would turn the certificate. *Ex parte Bostock, re Wright*, 1832. 1 Dea. & Chit. 383.

TRADE, IMPLEMENTS OF.

A lessee of a mill and steam engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the heighth and extent of the mill, and removed all the works of the engine, except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power:—Injunction granted to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building and the new parts of the engine, subject to an action to be

brought, by the lessors, to try the right. *Sunderland* v. *Newton*, 1830. 3 Sim. 450.

TRADER.

The keeper of a private lodging-house, who also seeks a profit by furnishing her guests with provisions, is subject to the bankrupt laws as an hotel keeper, although the provisions are set apart as the separate property of each guest. *Smith* v. *Scott*, 1832. 9 Bing. 14.

The wife of a convicted felon sentenced to transportation beyond the seas for the term of fourteen years, but removed to and confined on board one of the hulks in this country, is liable to be made a bankrupt, if she trade on her own account, although she is in the habit of visiting her husband and holding communications with him during his confinement. *Ex parte Franks*, 1831. 6 Moore & P. 1.

A commission cannot be supported by an act of bankruptcy by lying in prison, unless the trading were before the imprisonment. *Ex parte Lynch, re Lynch*, 1832. 1 Mont. 453.

TRANSFER.

And see ASSIGNMENT.

The custom at the London Docks is to acknowledge no title in wines, unless accompanied with possession of dock warrants indorsed by the party to whom they were originally issued. Where *A.* received warrants from *B.* not indorsed by *B.*, and *A.* delivered and indorsed them to *C.*, who afterwards procured *B.*'s indorsement, and *A.* became bankrupt:—Held, the wines passed to *C.*, though notice of transfer to dock company, and indorsement by *B.*, were subsequent to the bankruptcy:—Held also, that for want of *B.*'s indorsement to *A.*, and transfer into *A.*'s name in the company's books, *A.* never had the order and disposition of them. *Ex parte Davenport, re Leach*, 1832. 1 Dea. & Chit. 397.

TRUSTEE.

Where a bankrupt trustee had suffered the trust fund to be misappropriated, the Court directed that the son of the *cestui que trust* might prove for the amount, retaining the dividends till further order. *Ex parte Vine, re Hooper*, 1832. 1 Dea. & Chit. 357.

Substitution of a new trustee, where the former one becomes bankrupt. *Ex parte Page, re Hill*, 1832. 1 Dea. & Chit. 321.

Where a bankrupt, in consideration of his wife's fortune, gave a bond to trustees to pay them 3000*l.*, as to which by the terms of a settlement it was declared that the bankrupt

should be entitled to the interest during his life, and after his death the principal was to go to his wife, and the bankrupt made default in the payment of his money:—Held, that the trustees might prove for 3000*l.*, and that the interest upon the dividends to be received under such proof should accumulate until the 3000*l.* should be realized; after which, but not before, the interest might be paid to the assignees for the benefit of the creditors. *Ex parte Turpin, re Brown*, 1832. 1 Dea. & Chit. 120. *S. C.* 1 Mont. 443.

UNCLAIMED DIVIDENDS.

Order made to divide unclaimed dividends among the other creditors. *Ex parte Donaldson, re Wright*, 1832. 1 Dea. & Chit. 110.

Order nisi only, in the first instance, made for distribution of unclaimed dividends. *Ex parte Robinson, re Lyon*, 1832. 1 Dea. & Chit. 542.

VOLUNTARY BOND.

Quære, Whether a creditor on a voluntary bond is entitled to vote in the choice of assignees. *Ex parte Venables*, 1831. 1 Mont. 494.

WAIVER.

Creditors having, subsequent to the appointment, signed resolutions authorizing the assignees to do certain acts, as assignees, which they could not have performed without such authority, and to act generally as assignees, are debarred from questioning the validity of the appointment at a subsequent period, upon grounds of which they were aware at the time of signature.

Semble, also, that the appointment is not complete till the declaration of appointment is signed by the Commissioner. *Ex parte Nash, re Wyatt*, 1832. 1 Dea. & Chit. 445.

A creditor, resting upon a common law lien, without proving under the commission previous to the Bankruptcy Court Act, appeared as a respondent, in opposition to a petition before the Vice-Chancellor, who ordered that the matter should be referred to the Commissioners, to ascertain the rights of the several parties, and that the creditor should have his costs. The creditor attended the inquiry before the Commissioners, but did not draw up the order of the Vice-Chancellor:—Held, that this was not enough to bring him within the jurisdiction of the Court.

Held also, that filing an affidavit is not a waiver of any objection to the jurisdiction. *Ex parte Reid, re Mills*, 1832. 1 Dea. & Chit. 250.

WILL, CONSTRUCTION OF.

A testator bequeathed the dividends of certain stock to his nephew, solely

for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the Lords' Act (1 *Geo.* 4. c. 119,) in the usual way; and some years afterwards the testator died: —Held, that this insolvency operated as a forfeiture of the life interest given to the nephew by the will. *Yarnold* v. *Moorhouse*, 1830. 1 Russ. & M. 364.

Where stock was given upon trust for *A.* for life, and after his decease for his children, with a proviso that *A.*'s life-interest should not be subject to any alienation or disposition, by sale, mortgage, or otherwise, in any manner whatsoever; and in case he should charge or affect to charge, affect, or incumber the same, such mortgage, sale, or other disposition, so made by him, should operate as a complete forfeiture thereof, and the same should devolve upon the persons next entitled:—Held, that on *A.*'s bankruptcy, his life-interest passed to his assignees to the exclusion of his children. *Lear* v. *Leggett*, 1830. 1 Russ. & M. 690.

WITNESS.

See also Affidavits—Evidence—Examination.

Testator, by will, directs his business to be carried on by his executors, and that when his son *B.*, (the bankrupt) attains 21, he should, on performing certain terms, be admitted to a fourth share. *B.*, at the age of 20, enters into another business on his own account, and never claims the right under the will, or performs those conditions: —Held, nevertheless, that he had not abandoned the right, and therefore that his assignees have a right to call the executors of the will before the Commissioner, and examine them as to the affairs of partnership. *Ex parte Marks, re Marks*, 1832. 1 Dea. & Chit. 499.

Affidavit of petitioning creditor may be received in opposition to petition to supersede. *Ex parte Lowley, re Lowley*, 1832. 1 Dea. & Chit. 460. *S. C.* 1 Mont. 515.

A bankrupt cannot be called as a w-i

ness either to support or to defeat the commission, or even to explain a doubtful act, which might or might not be an act of bankruptcy. *Sayer* v. *Garnett,* 1830. 4 Moore & P. 734. Contra, *Ex parte Palmer,* 1832. 1 Dea. & Chit. 375.

Whether, on an indictment against a bankrupt for concealing his effects, the petitioning creditor is a competent witness to prove the petitioning creditor's debt. *Quære. Rex* v. *Walters,* 1831. 5 Car. & P. 138.

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